

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 64

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LOCAL 357, INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD.

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No. 85

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NATIONAL LABOR RELATIONS BOARD,  
PETITIONER, <sup>2</sup>

vs.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NO. 64 PETITION FOR CERTIORARI FILED MARCH 28, 1960

NO. 83 PETITION FOR CERTIORARI FILED MAY 11, 1960

**JOINT APPENDIX**

IN THE

**United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 14,794**

**LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,**  
*Petitioners,*

**v..**

**NATIONAL LABOR RELATIONS BOARD, *Respondent.***

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**On Petition for Review of An Order of the National Labor  
Relations Board**



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### **PREHEARING ORDER**

Counsel for the parties in the above-entitled case having submitted their stipulation dated March 5, 1959, and the stipulation having been considered, the stipulation of the parties is hereby approved, and it is

ORDERED that the parties proceed according to the stipulation and that this order and the stipulation dated March 5, 1959, be printed in the joint appendix.

Dated: March 5, 1959.

### **PREHEARING CONFERENCE STIPULATION**

Pursuant to Rule 38 (k) of the Rules of this Court, the parties, subject to the approval of the Court, do hereby stipulate and agree as follows with respect to the issues, the dates for the filing of the briefs and joint appendix, and the contents of the joint appendix:

#### **I.**

##### **Statement of the Issues**

1. Whether the Board properly concluded that the exclusive hiring agreement between the petitioner and an employer on its face constituted unlawful encouragement of union membership in violation of Section 8 (b) (2) and unlawful coercion of employees in violation of Section 8 (b) (1) (A) of the National Labor Relations Act, as amended.

2. Whether the Board properly concluded that the petitioner caused the discharge of Lester Slater in violation of Section 8 (b) (2) and 8 (b) (1) (A) of the Act.

3. Whether the Board order requiring the petitioner and an employer to make Slater whole for any loss suffered by him by reason of the discrimination against him and also to

reimburse employees for monies collected pursuant to the illegal hiring provision is valid and proper.

It is the petitioner's position, but not the Board's, that a further issue is presented and that it should follow #1 above, namely:

Whether the Board is authorized under the Act to require to be included in an exclusive hiring agreement as a condition of its legality the following safeguards:

(1) A provision stating that selection of applicants for jobs shall be on a non-discriminatory basis?

(2) A provision giving the employer the absolute right to reject any applicant?

(3) A provision requiring the parties to the hiring agreement to post notices thereof, including notices of all provisions relating to the functioning of the agreement?

## II.

### The Briefs and Joint Appendix to Briefs

1. The petitioner will file and serve its opening brief on or before April 22, 1959. The Board will file its brief on or before May 25, 1959. The petitioner will file and serve its reply brief, if any, on or before June 15, 1959.

2. The joint appendix will consist of such portions of the record in Case No. 21-CB-783 before the Board as the parties hereto shall respectively designate. The joint appendix will be printed by a printer mutually agreed upon, and will be filed with the petitioner's opening brief.

3. It is further agreed that any party and the Court, at or following the hearing in the case, may refer to any portion of the original transcript of record or exhibits herein which has not been printed, or otherwise reproduced, it being understood that any portions of the record thus re-

ferred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

/s/ HERBERT S. THATCHER  
*Counsel for Petitioner*

/s/ MARCEL MALLET-PREVOST  
*Assistant General Counsel*  
*Counsel for*  
*National Labor Relations*  
*Board*

Dated this 5th day of March 1959,  
at Washington, D. C.

BEFORE THE NATIONAL LABOR RELATIONS BOARD  
TWENTY-FIRST REGION

In the Matter of:

LOS ANGELES-SEATTLE MOTOR EXPRESS,  
INCORPORATED,

and

LESTER H. SLATER, An Individual,

and

CALIFORNIA TRUCKING ASSOCIATION,  
INC.,

Case No. 21-CA-2416

Party to the Contract

In the Matter of:

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFERS, WAREHOUSE-  
MEN AND HELPERS OF AMERICA, LOCAL  
357, AFL-CIO,

and

LESTER H. SLATER, An Individual,

and

CALIFORNIA TRUCKING ASSOCIATION,  
INC.,

Case No. 21-CB-783

Party to the Contract

111 West Seventh Street,  
Los Angeles, California,  
Monday, August 27, 1956.

Pursuant to notice, the above-entitled matter came on for  
hearing at 10:00 o'clock, a.m.

BEFORE:

WILLIAM E. SPENCER, Trial Examiner.

APPEARANCES:

PAUL WEIL, Esq.

111 West Seventh Street,  
Los Angeles, California,  
appearing on behalf of the  
General Counsel of the  
National Labor Relations  
Board.

STEVENSON & HACKLER, 846 South Union Avenue,  
By: CHARLES K. HACKLER, Los Angeles 17, California;  
Esq.,

and

BARNEY VOLKOFF,

Business Representative,  
846 South Union Avenue,  
Los Angeles 17, California,  
appearing on behalf of  
International Brotherhood of  
Teamsters, Chauffeurs, Ware-  
housemen and Helpers of  
America, Local 357, AFL-CIO.

GLANZ & RUSSELL,

By:

THEODORE W. RUSSELL,  
Esq.,

639 South Spring Street,  
Los Angeles 14, California,  
appearing on behalf of Los  
Angeles-Seattle Motor Ex-  
press, Incorporated.

ARLO D. POE, Esq.,

639 South Spring Street,  
Los Angeles 14, California,  
appearing on behalf of  
California Trucking Associa-  
tions, Inc.

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## PROCEEDINGS

Trial Examiner Spencer: The hearing is in order.

This is a hearing before the National Labor Relations Board in the matter of Los Angeles-Seattle Motor Express, Incorporated, and Lester H. Slater, An Individual, and California Trucking Association, Inc., Party to the Contract; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 357, AFL-CIO, and Lester H. Slater, An Individual, and California Trucking Associations, Inc., Party to the Contract, Case No. 21-CA-2416 and 21-CB-783.

The Trial Examiner appearing for the National Labor Relations Board is William E. Spencer.

4      **Appearing for the General Counsel is Paul Weil, Esquire.**

Appearing for International Brotherhood of Teamsters, et al, Stevenson & Hackler by Charles K. Hackler, Los Angeles, California, and Barney Volkoff, Los Angeles, California.

Are there further appearances?

Mr. Russell: On behalf of Los Angeles-Seattle Motor Express, Incorporated, Glanz & Russel, by Theodore W. Russell.

My address is 639 South Spring Street, Los Angeles 14, California.

Trial Examiner: Appearing for the California Trucking Associations, Inc., Arlo D. Poe, Esquire, 639 South Spring Street, Los Angeles.

33                      **E. J. McCarthy**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

#### **Direct Examination**

Q. By whom are you employed? A. California Trucking Associations.

34      Q. What is your position with the Association?  
A. Director of Labor Relations.

Q. Did you have anything to do with the contract which is known as the Master Dry Freight Agreement or Master Labor Agreement between California Trucking Associations, Inc. and International Brotherhood of Teamsters,



Chauffeurs, Warehousemen and Helpers of America, Joint Council of Teamsters No. 42? A. I participated to some extent, yes.

. . . . .

Q. Having specific reference to Section 1 of that contract, providing for the dispatch by the union on a seniority basis of employees, where senior employees are available, does your Association have any machinery set up  
35 by which it determines the seniority of employees?

A. Not on those casual employees, no.

Q. Are records kept of the collection of seniority by employees in the casual categories—by the Association? A. No.

. . . . .

Q. Do you or does anyone working under you consult with the respondent union here concerning the union's determination of seniority among casual laborers? A. No.

Q. Do you consult with the union concerning, that is, the respondent union, concerning its placement of names of employees on the seniority list? A. No.

Q. Do you consult with it concerning its striking of the names of employees from the seniority list? A. No.

Q. Is a copy of the seniority list, if such there be, furnished to you by the union? A. No.

. . . . .

#### 41 Cross Examination

. . . . .

Q. About how many members do you have in your Association? A. Membership in the Association is approximately a thousand truck operators.

. . . . .

Q. Now, of those members, approximately how many at this time do you have these powers of attorney from to



enter into collective bargaining agreements? A. Approximately 50 percent of them.

42 Q. What geographical area approximately is covered by the Master Labor Agreement? A. Master Labor Agreement covers seven California territories, which would be approximately from San Luis Obispo and Bakersfield south to the Mexican Border.

44 Q. To your knowledge, Local 357 of the Teamsters in Los Angeles has jurisdiction over what general types of employees? A. Freight handlers and office employees.

47 Trial Examiner:

Does the contract define "casual employee"?

The Witness: No, it does not.

Q. Are you familiar with whether there is a practice, as between the members of the Association and the unions that are bound by the agreement, as to what a casual is in that connection? A. I know what the accepted practice is.

Q. Would you tell me what it is? A. A casual employee is one who is hired for a portion of a day or a full day.

Q. So that at the most his term of employment would be one day? A. Yes.

48 Q. And has it been the practice, do you know, in the industry that if he is going to be used on more than one successive day that he will be rehired each succeeding day? In other words, assume that the company has work requiring casual help for several days running: Has it been the practice that the casuals will be hired each day then as that work develops? A. Yes.

Trial Examiner: Just to be sure we are entirely clear on

that, you hire Employee A for one full day. He is a casual employee because he is hired for only one day, is that correct?

The Witness: Yes.

Trial Examiner: Then at the end of that day you find there is work for Employee A the next day. Do you hire him all over again for the next day?

The Witness: Under the terms of the collective bargaining agreement, yes.

Trial Examiner: That would keep him in the status of casual employee?

The Witness: That's right.

Q. (By Mr. Russell) Has that been the practice as you have found it in the industry? A. There have been some exceptions to that, as I understand the method of dispatching from the hiring hall, where an employer would call the hall, advising them that they needed an individual for two, three, four days a week; the dispatch from the hall would be on that basis.

49 Q. (By Mr. Russell) Can you tell me, since May 1  
of 1955, has there been an interruption of work generally  
50 in the industry in this area by the members of your Association? A. Yes.

Q. About when did it begin and about what date did it end, as a general interruption? A. Well, it was in the latter part of May, and it terminated approximately the middle of June, as I recall.

52 Re-cross Examination

54 Q. Are you familiar with the practice that employers who have freight, either on their docks or warehouses to be moved or to be unloaded from freight,

cars or otherwise, will call the dispatch hall on short notice and tell the number of casual laborers they need, and that the hall will make an effort to send the number asked for, in normal operations? A. It is my understanding.

57

Lester H. Slater

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

## Direct Examination

Q. What do you do for a living? A. A freight handler.

Q. Have you ever been employed by Los Angeles-Seattle Motor Express? A. Yes.

Q. Who hired you? A. Bill Simpson.

58

Q. Who was he? A. Superintendent of the dock and trucks.

Q. Now, will you tell us what was said by each of you in this conversation? A. Well, I went to him with a letter from John Angrand. I showed him the letter, and he took it on into the office.

Q. What did you say, you must have said something before? A. Well, I just showed him the letter and he read it. Then he says, "Just a minute," and he took it on in the office. He come back out, he says, "Yes, I will hire you. But go and have a photostatic copy made of this letter and bring it back to me." I did, so I brought it back to him and he put me on that night at 5:00 o'clock.

73 Q. While you were employed by the Los Angeles-  
Seattle Motor Express, did you have any contact  
with any representative of the union? A. Yes.

Q. Do you know whom? A. Well, he is a business agent.  
I can't recall his name, but his first name is Vic.

74 Q. Tell us what you and Vic said to each other, if  
any thing. A. He come up to me, he asked me if I  
had my card. I says no. He asked me what rights I had  
there. I said, "I have a letter that says I can work here."

I can't recall how it happened, but I sent him over to see  
Bill Simpson, and that's the last I seen him.

Q. Were you terminated after that? A. No.

Q. Were you discharged after that? A. I was dis-  
charged a few days afterward.

Q. By whom? A. By Oscar Nielsen.

Q. Who is Oscar Nielsen? A. Night foreman.

75 Q. Now, will you tell us what you said to each  
other; if anything? A. Well, he says, "I can't use  
76 you now until you get this straightened out with the  
union. Then come back; we will put you to work."

Q. Did you have any further conversation with any  
officer of the company or with any representative of the  
company, that you know of? A. Mrs. Cody and I, my  
landlady, and talked to Bill Simpson.

77 Q. (By Mr. Weil) Just tell us as best you can  
what was said. A. Well, I know Mrs. Cody went in  
to talk to him. He says he is sorry the way they have been

acting, doing things, and he'd like to see me get it straightened out because he'd like to have me come back and work with him.

79 Q. (By Mr. Weil) As I recall, to go back, your testimony was that you saw Mr. Volkoff before you saw Mr. Simpson? A. We were supposed to see John Annand that Monday.

80 Q. Now, you state you were supposed to see Mr. Annand. Did you have an appointment?

A. I called him up to his home on Sunday and asked him when he was able for me to see him. He says, "Come in Monday morning at 9:00 o'clock."

Q. Did you see Mr. Annand? A. No.

Q. What happened? A. Well, the lady at the desk up there told us Barney Volkoff would take care of it, so she sent us down to him.

Q. Did you go down to see Mr. Volkoff? A. Yes.

81 Q. Was that in the same building? A. Yes.

Q. Where is that building located, do you know?

A. It is on Union Street, Ninth and Union.

Q. Now, is that near where—anywhere near the hiring hall? A. No.

Q. Where is the hiring hall located? A. Well, it is down here on Olympic Street near Gladys.

Q. About how far apart are those two, can you estimate or do you know? A. Well, around three miles or over, or

so.

Q. Did you see Mr. Volkoff? A. Yes.

82 Q. Well, start with your conversation with Mr. Volkoff. A. Well, we went there, and he asked us what we wanted. We said, "We'd like to see you."

He asked us in his back office, and he wanted to know what he could do for us. I said to see if I can get some work, straighten it out. He said, "I can't do anything for you because you are out. You are not qualified for this job."

And Mrs. Cody showed him the photostatic copy of John Annand's letter, and he said this letter didn't mean anything. He says, "I am the union." The way he said it, I guess he was top man.

Q. Was there any mention made of a withdrawal card? A. Oh yes, yes, there was. He said, well, I should take a withdrawal card and join another union.

83 Q. Have you had any conversation with Mr. Simpson since then? A. Yes.

84 Q. (By Mr. Weil) Did he say anything about coming back to work? A. As soon as I got this straightened out, he'd take me back or he'd get me on in the spring, when things get going more, and he wanted to keep me right on.

Q. Do you recall anything else that was said? A. He says he'd like to have me there because other men come out of that hall, can't get much work out of them because some of them come down there, they have been drinking a little, and things like that, and they'd have to work them four hours, then he'd let them go because they weren't very good workers.

85 Q. Had you ever worked out of the hiring hall? A. Yes.

Q. When did you first start working out of the hiring

hall? A. Well, I believe it's around—I couldn't tell you the exact month, around in '53 or somewhere around there.

Q. Did you go to the hiring hall before you went to the union offices? A. To see about getting work, and the dispatcher down there told me I'd have to go up there and see Barney Volkoff. He told me where to go, and I did.

Q. What took place when you went up to see Mr. Volkoff? A. Well, just give him the money to send back East to pay up my dues back there for the withdrawal card, and he give me a card, and I went right to the hall and went to work.

100 Q. (By Mr. Weil) After your conversation, or during your conversation with Mr. Volkoff at that time,—now, I am referring back to your first visit to the hiring hall and to Mr. Volkoff—were you given a card? A. Yes.

Q. Was it— A. A card to seek work out of the hall.

101 Q. (By Mr. Weil) Were you given a hiring hall dispatchment card? A. Yes.

Q. What did you do with it? A. Took it to the hiring hall.

Q. To whom did you give it? A. Dispatcher down there.

102 Q. Now, during the time you were dispatched out of the hiring hall, what was the procedure in being dispatched? A. Well, this card, they punched it every time you come in, in the day, any time you come in; and they put it in a cigar box behind others, see, and when it come to your card, your turn to go out, they would give you a work card to go out on the jobs.



## 106 Cross Examination

109 Q. Does that date, January 14, 1954, strike you as the approximate date when you began working as an extra? A. Yes.

110 Q. (By Mr. Hackler) Was it the practice at the hall, when you took this card to the hall, to hand it in, to be stamped on a timeclock to show the time of your arrival there? A. Yes.

118 Q. What was your practice when you got the card and you got to the job? To whom did you give it, if you did? A. Well, there was a foreman on the job.

119 Q. Wasn't it your practice to turn it in to management when you got there? A. Yes.

Q. Did you ever get it back after that? A. No.

121 Q. And then after that job was over, I assume you were dispatched out and worked one day or some part of it, you would go back to the hall the next day, isn't that right? A. That's right.

124 Q. Did you have some discussion with Barney Volkoff then about some reports that employers had made about your work? A. Employers never made no complaint about my work. He never said anything about that they complained.

Q. So it is your testimony that as of now you are not aware that any employer ever made a written complaint about your work, is that right? A. That's right.



126 Q. And you became acquainted with a number of other men who for years had done the same thing, did you not? A. Yes.

Q. And that was their steady employment, namely, to be dispatched through the hall to different ones of these companies, isn't that right? A. Yes.

129 Q. Occasionally, you were sent out to Los Angeles-Seattle, weren't you? A. Yes.

130 Q. On these cards? A. I was requested there a lot.

Q. To your knowledge, was it a practice, if a company called for a particular man, that that man was sent? A. That's right.

131 Q. Didn't make any difference whether he was a union member or had seniority or what not? A. He had to be a union member; otherwise he wouldn't be working there.

Q. (By Mr. Hackler) How did it come to your attention that employers sometimes called for particular men to be sent to them? A. As I just told you, you can tell what man is in front of you. That's the only way you know, 132 unless a man said himself he was requested, because he knew there was other men ahead of him.

Q. And he was ahead of you, why would he be ahead of you? A. Because he got there before you.

Q. That particular morning? A. Yes.

Q. Did that have to do with his length of service at all, the length of time he had been dispatched out of that hall, or did it just mean that he got there at the hall in line

ahead of you? A. He got there in line ahead of you, unless he was left over from the next day.

133 Q. Now, a moment ago you made the statement that no man got dispatched out of the hall unless he was a union member. Will you just tell us factually upon what you base that statement? A. Because you got to have your dues paid up to date and so forth.

Q. How did that come to your attention? A. I have always knew that.

141 Q. I believe you said that some named individual, you called him "Vic" came out and spoke to you while you were working at Los Angeles-Seattle? A. That's right.

142 Q. You had seen him before in connection with checking union cards, is that right? A. Yes.

Q. You had a union card at that time, didn't you? A. That's right.

Q. Fully paid up? A. That's right.

Q. In good standing? A. Always was.

Q. And how long was it that you kept that card? A. I kept it until Barney sent me a withdrawal in the mail in January.

143 Q. All right, Vic, what was your conversation with him? Just tell us. A. He asked me what was I doing there, if I had a work card. I says no, and he says I have no right to work there, and I said, "Oh, yes, I do." And I told him that, "I have a letter showing that I have a right to work there."

148 Q. In other words, your understanding was, when you got that letter, from that time onward you didn't

have to go through the dispatch hall like the others, but you went directly to whatever employer you wanted to, to get extra work? A. That's because I was forced to; I was a union member and I had a right to seek work when the president wouldn't give me work.

150 Q. My question is now, isn't it a fact that Volkoff said that you were wrong about the letter? A. He said the letter didn't mean anything.

Q. Is that all that he said? A. No.

Q. What else did he say? A. He told me I wasn't qualified to work out of this local.

152 Q. Isn't it a fact that Mr. Volkoff told you that if Los Angeles-Seattle wanted to hire you as a regular employee it was perfectly all right with the union? A. Yes.

Q. Did you ever go back and ask Los Angeles-Seattle for regular employment? A. Yes.

Q. What did they tell you? A. Just as soon as he can.

Q. When did you go back and ask for regular employment as a regular employee? A. Before I ever went there I asked for work; before this letter, I have lots of times. But during then he wanted me to get this thing straightened up.

160 Q. The 10th was the last day you worked, of November, right? A. Yes.

165 Q. Speaking of Vic, do you see the gentleman here in the courtroom? A. Yes.

Q. Where is he? A. Sitting next to you.

Q. Would that be Mr. Karaty sitting here in the hearing room? A. Yes.

## 179 Redirect Examination

180 Q. Are you still a union member? A. Yes.

Q. Have you been a union member at all times between the time you joined after you left Acme and the present? A. Yes.

Q. When did you get your withdrawal card? A. They sent it back to me December 29th, and I received it on December 30th.

Q. What year? A. '55. I had already paid my January dues, and he sent that back with it.

188 Q. Did you ever tell Mr. Simpson or Mr. Nielsen that you would not be dispatched from the hiring hall or could not be?

189 The Witness: Yes. I told him that Barney wouldn't let me work out of the hall any more, and I went down and told him about it.

191 Q. After you were discharged from Los Angeles-Seattle, did you go back to the hiring hall and ask for a dispatch? A. Went back to Barney.

Q. (By Mr. Weil) Were you dispatched after that? A. No.

192 Q. Were you told that you would not be dispatched after that? A. Yes.

Q. By whom? A. By Barney.

196 Q. Was there anyone else present? A. Mrs. Cody was with me.

## 197 Recross Examination

199 Q. I believe you said that you told Mr. Simpson in May or June that the hall wouldn't dispatch you. Isn't it a fact that you were dispatched out of the hall all through the month of May and up into the month of June?  
A. For 30 days I was dispatched there.

## 201 Further Redirect Examination

Q. What do you mean by that, what was this period of 30 days? A. Well, that was the time Mrs. Cody went to see him the first time. He said he didn't want to give me work then after he kicked me out of the hiring hall. She talked him into it, to give me three days a week. He  
202 said what would that mean? She said, "A child could answer that."

Trial Examiner: Strike that. Hearsay.

203 Q. Did you at any time have a conversation with Mr. Volkoff as a result of which he agreed to dispatch you for 30 days? A. Yes.

Q. Do you recall when that conversation was held? A. Well, I can't recall the day when I went up there, but it was around May sometime, I believe it was.

206 Trial Examiner: Give us the conversation between you and Barney on this date in May sometime prior to your hiring by Los Angeles-Seattle. Who said what?

207 Q. When you came in the office, and tell us all that

each of you said: A. I came into the office. I showed Barney the places where I looked for work on some different pieces of paper. I said they ~~all~~ signed it. There weren't any work. I asked them first. Each place I went, I got their name and so forth; some gave cards, and I took them and give them to Barney. He looked them over. He says, "That shows they don't want you."

That was during the strike time, and somebody else come in. He said, "How about the time that you wouldn't go out on the picket line?"

See, I wasn't in the picket line. Nobody sent me. Otherwise I'd have.

Q. Just tell what was said. A. He said, "Give him a withdrawal card," that other fellow that was in the office up there said. And Barney gave me the work card for 30 days, and he says, "After that you will have to go and get your own."

210 Q. Now, then you worked in the hiring hall for 30 days, worked out of the hiring hall; they dispatched you for 30 days after that? A. Beginning the week there, I didn't work steady because somebody said the strike was on.

211 Q. Now, at the end of that 30 days did you continue working? Did you continue working out of the hiring hall? A. No.

Q. (By Mr. Weil) At the end of the 30 days, did you have another conversation with Mr. Volkoff? A. Yes.

Q. How did you happen to have that conversation? A. The dispatcher down there give me the card and told me to take it to Barney Volkoff.

212 Q. Did you take the card to Barney? A. Yes.

213 Q. Will you tell us what was said in this conversation? A. There was another guy in the hall. He says—Barney said something about, "How come you weren't out on that—didn't go out on the picket line?" I told him that nobody asked me to. I was out a week. I thought the strike was on. The hall was closed. The guys told me there weren't no work.

Q. Is this what you told him? A. Yes. And the other guy stepped in; he said, "Why don't you give him a withdrawal card?"

And I got right up and got out because I wouldn't stand for that.

Q. (By Mr. Weil) Was anything said about your not being dispatched any further, any longer? A. Yes.

214 Q. (By Mr. Weil) Have you told us all of that conversation? A. No, I didn't. He told me that I was just out, that I wasn't qualified to work out of this union at that time.

Trial Examiner: Did Barney tell you that?

The Witness: Yes.

## 215 Further Recross Examination

Q. (By Mr. Hackler) Do you recall that your last dispatchment before May 10th, before your meeting with Barney on May 10th, was to Pacific Intermountain Express Company? Do you recall being dispatched from the hall to that company? A. Yes.



216 Q. And when you got out there did you put in any  
work at all? A. No.

217 Q. That you got paid for? A. No.

. . . . .

218 Q. Whom did you see there, some representative  
of the company? A. Yes.

Q. Did you have a conversation with him? A. Yes. He  
said, "You have to go over there and unload these trucks  
over there." I knew where he pointed; I told him I couldn't  
break out very good.

Q. What did you mean when you told him, "I can't break  
out very good," after he told you to go over to those  
trucks? A. Because him and I, we tried it; I tried it before  
there with him, breaking out, calling over the loudspeaker.  
I couldn't do a very good job doing that, so they put me  
breaking out other trucks; they gave me a list to break out  
that one time, but that time I told him I couldn't do it.

. . . . .

219 Q. And you told him that you didn't think you  
could do it very good, but that there was some other  
job out there that you could do? A. I could do anything  
else he wanted to put me on. It was up to him.

Q. You told him the particular job he asked you to do,  
based on your past experience, you couldn't do it very  
well? A. That's right.

Q. And what did he do then, did he put you to work or  
send you away? A. He sent me away. He said, "If you  
can't do it, go on back to the hall."

. . . . .

221 Q. In any event, you went back to the hall and  
showed them the card and told them what had hap-  
pened, is that right? A. Yes.

Q. To whom were you talking there, the dispatcher? A.  
Yes, his name is Blackmar.

. . . . .



Q. And he said, "You had better go over and see Barney about this," is that correct? A. Yes. He told me to go and see Barney.

Q. Did you go see Barney that day at all? A. Yes.

230 Q. (By Mr. Hackler) Let me direct your attention to Respondent Union's 2, which is a referral card dated February 4, 1954, which you identified as a dispatchment card to the Southern California Freight Lines on Alameda Avenue.

When you got out on that dispatchment, did you work?  
A. No.

Q. Did you fail to show up on the dock or go to the wrong dock or something? A. Wrong dock.

Q. They didn't see you, did they? A. No, but I went several times after that.

235 Q. Do you recall an occasion in October of 1954 when the W.F.A. Company—when you were sent out to the W.F.A. Company, you had some dispute or problem over the parking situation? A. Yes.

236 Q. You took a card out there, and what reason did they give you for sending you back to the hall? A. I tried to park in front of the place. A guy come out; he said, "You can't park there. Take it across the street and park it." And I did. And it is a railroad yard over there, and they had signs up, "No Parking."

237 I went back and told him, and he said, "If you can't find a place to park, take the card and go on back."

## 233 Further Redirect Examination

Q. (By Mr. Weil) You testified concerning an incident at P.I.E., where you described the breaking-out procedure. What was there about breaking out that you couldn't do very well? A. Well, I couldn't read them all out, to read them correctly over the loudspeaker, which I could if I had the bills.

. . . . .

Q. What was there about that that was difficult for you?  
A. Hard to read all the words.

. . . . .

244

**Oscar Nielsen,**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

## Direct Examination

245 Q. By whom are you employed? A. Los Angeles-Seattle Motor Express.

Q. What is your job there? A. Dock foreman.

. . . . .

249 Q. (By Mr. Weil) Now, Mr. Nielsen, during Mr. Slater's employment by you, were you approached by any representative of the union in regard to Mr. Slater's employment? A. Mr. Karaty.

. . . . .

Mr. Hackler: Stipulate that he is a business agent of Local 357, or was at the time in question.

. . . . .

250 Q. Can you tell me when—as a point of reference. I believe the date of the discharge was November

12th—can you tell me when, in reference to that, you and Mr. Karaty spoke at the terminal about Mr. Slater's employment? A. Why, yes. He said that he couldn't work there without a referral card.

251 Q. Did you have a further meeting? A. Well, the last night before Mr. Slater was discharged, yes.

Q. What was said at this meeting? A. He asked the same question. He says, "Have you got a referral card on Slater?"

I said, "No, Mr. Simpson is taking care of that. He has the letter on him."

Q. Was there anything else said? A. Well, yes. He said that, "You can't work this man any longer here without a referral card."

252 Q. Was there anything else said then in that conversation? A. Yes. He says, "If I catch Slater back here again," he said, "I will have to run every man off the job."

260 Cross Examination

263 Q. Was Mr. Slater a competent employee during the time he worked for you? A. Well, in his capacity  
264 he was a good worker.

Q. Did he ever refuse to do any job for you? A.  
No.

**William L. Simpson,**

called as a witness by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

## Direct Examination

Q. Are you employed by the Los Angeles-Seattle Motor Express Company, Inc. A. Yes.

265 Q. In what capacity? A. Terminal superintendent.

Q. How long have you been in that capacity? A. About ten years.

Q. Does the terminal superintendent and the dock superintendent, are they the same thing? A. Same thing.

Q. As part of your job, do you hire employees who work for the company? A. Some of them.

Q. Who else hires employees? A. Well, Seattle hires some for the over-the-road men.

Q. Referring particularly to the men who work on the dock, do you hire all of them? A. The biggest part of them yes.

Q. Now, do you have regular employees who work on the dock? A. Yes, we do.

Mr. Hackler: May I inquire, when you said "hire employees," do you have reference to regular or casual employees?

Mr. Weil: I am just coming to that.

Q. (By Mr. Weil) You have casual employees who work on the dock? A. Yes.

Q. Do you hire those yourself? A. That's right.

266 Q. How do you get your extra employees? A. We call them from the hiring hall.

Q. What hiring hall? A. Union hiring hall.

274 Trial Examiner: Are you familiar with the wage scales that are paid under this contract?

The Witness: Only by the little card that the union puts out.

275 Q. What did Mr. Watkins tell you about hiring through the union? A. Well, sometime back he stated that we were to get our extra labor from the union hiring hall.

276 Q. (By Mr. Weil) Mr. Simpson, did you or Mr. Nielsen or anyone working under you keep a record of the dispatches of individuals from the hiring hall to you, any type of a record? A. Well, we don't keep a record of them. We just call down there and they send us men if they have them, to fulfill our requirement.

278 Q. (By Mr. Weil) Did you hire Mr. Slater on or about August 27, 1955? A. Yes, I did.

279 Trial Examiner: Mr. Slater asked you for employment; did you tell him anything at that time?

The Witness: Yes, I told him that if he could clear through the union, why, sure, that we could use him.

Q. (By Mr. Weil) Did he answer that? A. He told me that he had a letter that he had from Mr. Annand saying that he could work.

Q. What did you say to him? A. I stated to him, if he could get me a photostatic copy, I see no reason why we couldn't use him extra for what we had.

284 Q. Did Mr. Karaty become angered after you showed him the letter? A. I can't remember whether he did or didn't.

294 Q. (By Mr. Weil) Do you recall what Mr. Karaty said on that occasion? A. My recollection is that he said that he had took Mr. Slater off some other jobs, or to

that effect, and I believe he stated that he couldn't read nor write, or thereabouts words.

295 Q. Will you tell us then what was said in that phone conversation, as you recall it now? A. Mr. Karaty stated that we'd have to get rid of Slater, and if we didn't, that he was going to tie the place up in a knot, would pull the men off."

297 William L. Simpson,

a witness recalled by and on behalf of the Employer, having been previously duly sworn, was examined and testified as follows:

#### Direct Examination

304 Q. In response to certain questions by Mr. Weil, you have indicated that from time to time you called the hiring hall, do you recall? A. Yes.

Q. What has been your practice in the past as to designation of particular persons, have you ever done that? A. Yes, we do use the same man back if he is a good employee or a good worker, and if he comes out, and we need him the following day, I usually call the hiring hall  
305 and so advise them, that we have asked that man to be used another day, and usually the hiring hall dispatcher says for me to change the card to the day, one more day or two more days, whichever we tell him that we are going to need the man, and go ahead and use him.

Q. I understand you have a situation where a man has come out on a card for more than one day? A. That's right.

Q. And then this other that you have described would be if you were going to use him beyond that first day? A. That's right. In other words, if we used a man yesterday,

which we did, and we needed him back today, we would notify the hiring hall this morning that we had told that man to come back.

Q. Have you ever had occasions when you would have occasion to use a man, say, on a Monday this week, find his work to be satisfactory, and maybe next week or the week after, when you required help, ask for that particular man? A. Yes, we do that quite often.

Q. How often did that happen in the fall of 1955 and since? A. If a man was working at that time, as shortage as labor was, he came out of the hiring hall, why, we would notify the hall that we were going to use him another day or two more days, whatever our needs was.

Q. My question, Mr. Simpson, now went to this other situation. Maybe I better ask it again to be sure we are talking about the same thing.

I understood you had two situations, when you might specify a particular man from the hall. One was where you had him working, we will say, today and you wanted him tomorrow; you would call the hall and say this man worked out all right, "I want to keep him another day." A. That's right.

Q. And the people at the hall would say, "Just change his card?" A. That's correct.

Q. Now, was I correct that you also had a situation where from time to time you might know a man who did good work, who was not working today, but you knew you were going to need a man tomorrow, and you would say, "I want you to send out Mr. Jones?" A. That's correct. I will call the hiring hall, and sometimes I will ask him if Mr. Jones is in there, if he was a good worker, and if they say yes I will say, "Well, send him back. He did a good job."

Q. Has this request been honored? A. Yes.

Q. That has been for extra work, has it? A. That's right.

• • • • •



310

**Florence Hilka Cody,**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

312 Q. You went with Mr. Slater to call on Mr. Simpson after Mr. Slater was released from Los Angeles-Seattle Motors; is that not so? A. Yes.

313 Q. Would you tell us what was said by you during this conversation? A. Oh, what was said was the first thing Mr. Simpson said how terrible it was that Lester Slater was put off the job there at Los Angeles-Seattle Motors Express, when he had that letter from John Annand, and he asked me, Bill Simpson, how it happened to be—how such a letter got to be written, and as long

314 as he asked me I told him. I said I went up to the Council to see Mr. Chapman; I didn't go to see Mr. Volkoff because I heard he was hard to talk to, and on the strength, the way he treated Mr. Lester Slater I thought it was best if I went to the Council, and I saw Mr. Chapman.

A. (Continuing) And Mr. Chapman and I talked the thing over about 15 minutes, and he was very nice. He said that he was pretty sure, a situation like this, "I am pretty sure Mr. Volkoff would straighten this out."

315 "Well, I asked Mr. Chapman if he would please call Barney Volkoff in his office," and I said, "I want to see his flying colors like you think he will help Mr. Slater."

He said, "All right, I will, Mrs. Cody." And he did. He



phoned down to Mr. Volkoff, and Mr. Volkoff come up into his office, and Mr. Chapman introduced me to Mr. Volkoff, and he said I was there on behalf of Mr. Lester Slater, and as soon as he heard that, I saw Mr. Volkoff get excited.

316 A. I asked Mr. Barney Volkoff what he had against Lester Slater and why he was doing this to him. And he said, "For a few reasons, one is about the P.I.E." He was telling me about that. And again he said "Another thing, he is an illiterate," and the other thing he said is that he didn't like the way he dressed. And he fussed around and fussed around.

317 Trial Examiner: Of course, you never got around to the matter of the letter, but maybe it is not material.

318 The Witness: I wrote to David Beck—

319 Victor L. Watkins,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. Are you the Mr. Watkins that was referred to as being the officer of the company in charge of the Los Angeles terminal? A. Yes.

Q. What is precisely your title in that respect? A. I am assistant general manager of the company, and in charge of the Los Angeles terminal.

Q. As such you have complete charge of the terminal? A. Yes.

319. Q. Do you have charge of the officers of the terminal, also? A. They are under my jurisdiction, yes.

320 Q. Do you know when an employee is dispatched to you by the hiring hall how much seniority he has? A. No.

Q. Do you have any way to determine that?

324 The Witness: If we felt it was necessary, we would probably call the Teamsters Union to see what information they had there, where these men had registered.

325 Q. Do you receive seniority lists of any type from the union? A. No.

328 Cross Examination

332 Q. (By Mr. Hackler) Are you familiar with a practice, if there is one, by which a casual employee who has been sent to your firm and who is not satisfactory for some reason, for example, he is drunk or wouldn't work or something of that kind, as to how a record of that gets back to the dispatch hall; do you know of any practice in that regard? A. I am familiar with that. The dock superintendent makes whatever report he feels is justified on the bottom of the referral card and mails it back to the union local.

Q. Now, inviting your attention for the purpose of form to Respondent Union's 4, which is a referral card, I

333 note there that there is a box where a cross mark can be placed, which says, "Refused to Hire."

Now, in the event a man was sent out to your company, and for any reason they refused to hire him, either because

of his condition or attitude or what not, would it be appropriate and is it the process for the people working under you to indicate that, either by a cross mark there or by remarks, giving the details of the incident, or by both? A: It is practical, and our dock superintendent does that.

Q. Do you know how that referral card with that added information gets back to the dispatch hall? A. Through the U.S. mail.

Q. Normally mailed back? A. Yes, from our place it is, yes.

### 338 Cross Examination

339 Q. (By Mr. Hackler) Mr. Watkins, do you recall being present at a meeting a few years back, which was called by the unions who operate this dispatch hall, a meeting attended by yourself and other employer representatives, at which the mechanical procedures being used at the hall, the dispatch hall, for casuals was discussed and explained and the forms shown, and the employer asked to cooperate in returning these cards in appropriate cases? A. Yes, I did attend such a meeting.

340 Q. About how long ago was that, sir? A. My closest estimate would be three years, or not more than four years ago.

Q. Where was it held? A. In the Teamsters Building at Ninth and Union.

341 Q. You may or may not recall this: Do you recall that that occurred shortly after those unions had settled a case before the NLRB, where a claim of discrimination had been made arising from the dispatch of casuals from this hall, if you know? A. I do not know.

342 Mr. Weil: May it be stipulated that now and at all times relevant to this inquiry John M. Annand, A-n-n-a-n-d, held the position of International Representative, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, and the elected position—

—of president of Joint Council 42.

### DECISION AND ORDER

On October 9, 1956, Trial Examiner William E. Spencer, issued his Intermediate Report in the above-entitled proceeding, a copy of which is attached, finding that the Respondents, Los Angeles-Seattle Motor Express, Incorporated, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 357, herein called the Respondent Company and Respondent Union, respectively, had not engaged in any of the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Intermediate Report, together with a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case and, for the reasons stated below, finds merit in the General Counsel's exceptions.

I. The Trial Examiner found that the Respondents did not violate the Act by giving effect to their 1955 contract. We do not agree.

During the period covered by the complaint, the Respondent Company and Respondent Union gave effect to a contract executed in May 1955, which provided, in pertinent part, as follows:

The Employer shall first call the Union or the dispatching hall designated by the Union for [casual] help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

This language in the contract plainly obligates the Respondent Company to hire casual employees exclusively through the Respondent Union. Such an exclusive hiring

agreement between an employer and a union, the Board has recently held, constitutes an inherent and unlawful encouragement of union membership, *unless* the agreement explicitly provides that: (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, by laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements; (2) The employer retains the right to reject any job applicant referred by the union; and (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards deemed by the Board to be essential to the legality of an exclusive hiring agreement.<sup>1</sup> None of these safeguards essential to the legality of an exclusive hiring arrangement is contained in the contract to which Respondent are parties. Under all the circumstances, we conclude that the Respondent Company has violated Section 8 (a) (3) and (1) of the Act, and the Respondent Union has violated Section 8 (b) (2) and (1) (A) of the Act, by giving effect to the hiring provisions of their contract.<sup>2</sup>

2. Nor do we agree with the Trial Examiner's finding

<sup>1</sup> *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 NLRB Nos. 126 and 126-A.

<sup>2</sup> As the charges against the Respondents were not filed within 6 months of the execution of the contract in question, our finding against the Respondents is limited in the manner indicated and no finding is based on the execution of the contract. In the instant connection, we have rejected the Respondents' contention to the effect that no unfair labor practice finding based on the contract is proper because no charge was filed which attacks the contract. The charges allege discrimination by the Respondent Company against Slater, caused by the Respondent Union, and the Respondents' violation of the Act, "by these and other acts." Such charges are adequate to support the pertinent allegations in the complaint. *Triboro Carting Corporation*, 117 NLRB 775. Moreover, the legality of the contract was put in issue by the Respondents themselves in raising it as a defense to the discrimination allegations of the complaint. See *Seaboard Terminal and Refrigeration Company*, 115 NLRB 1391.

that the Respondent Company did not discriminatorily deny employment to Slater, the charging party, after November 10, 1955, and that the Respondent Union did not unlawfully cause such discrimination.

Prior to November 10, 1955, Slater had obtained employment from the Respondent Company, although not dispatched by the Respondent Union. Upon learning of this fact, the Respondent Union complained to the Respondent Company that it was violating their contract by employing Slater without a referral card, and demanded that it cease using Slater without such a referral by the Respondent Union. On November 10, the Respondent Company complied with the Respondent Union's demands and told Slater not to return to work until he "had the matter cleared up." Slater has not worked for the Respondent Company since.

The foregoing facts make it abundantly clear that Slater's loss of employment after November 10 was the result of the Respondents' implementation of the hiring provisions of their contract.<sup>3</sup> It having been found that those hiring provisions were unlawful, it follows that Respondent Company's denial of employment to Slater, as demanded by the Respondent Union, was also unlawful and violative of the Act.<sup>4</sup> Accordingly, we find that the Respondent Company violated Section 8 (a) (3) and (1) of the Act, and the Respondent Union violated Section 8 (b) (2) and (1) (A) of the Act, by their conduct with respect to Slater.

### **The Remedy**

Having found that the Respondents have violated the Act, we shall order that they cease and desist therefrom

<sup>3</sup> Like the Trial Examiner, and for the reasons stated by him, we find, in agreement with the position of the Respondents themselves, that Slater was a casual employee under the contract at all critical times herein.

<sup>4</sup> *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al, supra.*



and take certain affirmative action in order to effectuate the policies of the Act.

By the illegal hiring provisions of their contract, the Respondents have unlawfully encouraged employees to join the Respondent Union in order to obtain casual employment, thereby inevitably coercing those employees to pay union initiation fees and dues. It would not effectuate the policies of the Act to permit the retention of the payments of these union initiation fees and dues which have been unlawfully exacted from casual employees. As part of the remedy, therefore, we shall order the Respondents jointly and severally to refund to the casual employees involved the initiation fees and dues paid by them as a price for their employment.<sup>5</sup> This remedy of reimbursement is, we believe, appropriate and necessary to expunge the coercive effect of Respondent's unfair labor practices.<sup>6</sup>

It has been found that the Respondents discriminated against Lester H. Slater. Because of Slater's status as a casual employee of the Respondent Company at the time of the discrimination against him, no order of reinstatement is warranted. However, we shall order that the Respondent Company and Respondent Union jointly and severally make whole Slater for any loss of pay suffered as a result of the discrimination against him. The back pay shall be computed in accordance with the formula promulgated in *F. W. Woolworth Company*, 90 NLRB 289.

As the Trial Examiner did not find that the Respondents discriminated against Slater, we shall not hold the

<sup>5</sup> Respondents' liability for reimbursement shall include the period beginning 6 months prior to the filing and service of the charges herein and shall extend to all such monies thereafter collected, exempting the period between the date of the Intermediate Report and the date of the Order herein, as the Trial Examiner dismissed the complaint insofar as it alleged that the Respondents' contract violated the Act.

<sup>6</sup> See *United Association of Journeymen & Apprentices of Plumbing & Pipefitting Industry of the United States and Canada, Local 231, AFL-CIO*, 115 NLRB 594; *Broderick Wood Products Company*, 118 NLRB 38; *Houston Maritime Association, Inc.*, 121 NLRB No. 57.

Respondents accountable for any back pay during the period between the issuance of the Intermediate Report and our Decision and Order. Cf. *Utah Construction Company*, 95 NLRB 196.

We shall direct each Respondent to notify the other, and Slater, that it has no objection to the employment of the charging party. The back pay liability of either Respondent shall be tolled 5 days after it serves such written notices.

### ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. The Respondent Company, Los Angeles-Seattle Motor Express Incorporated, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to provisions of any agreement with the Respondent Union, or any other labor organization, which unlawfully conditions the hire of applicants for employment, or the retention of employees, upon referral or clearance by the Respondent Union, or any other labor organization, except as authorized by the proviso to Section 8 (a) (3) of the Act;

(2) In any like or related manner encouraging membership in the Respondent Union, or in any other labor organization, or otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act;

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Jointly and severally with Respondent Union, make whole Lester H. Slater for any loss he may have suffered

by reason of the discrimination against him, as provided in the Section herein entitled "The Remedy":

(2) Jointly and severally with Respondent Union, reimburse all employees for monies illegally exacted from them in the manner and to the extent set forth in the section herein entitled "The Remedy":

(3) Post at its offices, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent Company's representative, be posted immediately upon receipt thereof and maintained by the Respondent Company for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Company to insure that said notice shall not be altered, defaced, or covered by any other material;

(4) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of back pay due and the rights of Lester H. Slater under the terms of this Order;

(5) Notify Lester H. Slater and the Respondent Union, in writing, that it has no objection to Slater's employment;

(6) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

II. The Respondent Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 357, its officers, representatives, and agents, shall:

In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words, "PURSUANT TO A DECISION AND ORDER," the words, "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to provisions of any agreement with the Respondent Company, or any other employer within the meaning of the Act, which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment with any employer, upon referral or clearance by the Respondent Union, except as authorized by the proviso to Section 8 (a) (3) of the Act:

(2) Causing or attempting to cause the Respondent Company, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8 (a) (3) of the Act:

(3) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act:

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Jointly and severally with Respondent Company, make whole Lester H. Slater for any loss of pay he may have suffered by reason of the discrimination against him, as provided in the Section herein entitled "The Remedy":

(2) Jointly and severally with Respondent Company, reimburse all employees for monies illegally exacted from them in the manner and to the extent set forth in the section hereof entitled "The Remedy":

(3) Notify Lester H. Slater and the Respondent Company, in writing, that it has no objection to Slater's employment:

(4) Post at its offices, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto as Appendix B.\* Copies of said notice, to be

\* See footnote 7, *supra*.

furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent Union's representative, be posted immediately upon receipt thereof and maintained by the Respondent Union for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Union to insure that said notice shall not be altered, defaced, or covered by any other material;

(5) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Dated, Washington, D. C., October 31, 1958.

BOYD LEEDOM, Chairman

PHILIP RAY RODGERS, Member

STEPHEN S. BEAN, Member

JOSEPH ALTON JENKINS, Member

JOHN H. FANNING, Member  
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX A  
NOTICE

TO ALL EMPLOYEES OF AND APPLICANTS FOR EMPLOYMENT WITH  
LOS ANGELES-SEATTLE MOTOR EXPRESS, INCORPORATED

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to

effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise give effect to the provisions of any agreement with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 357, or with any other labor organization, which unlawfully conditions the hire of applicants for employment, or the retention of employees, upon referral or clearance by the aforementioned labor organization, or any other labor organization, except as authorized by Section 8 (a) (3) of the Act.

WE WILL NOT in any like or related manner encourage membership in the above-named labor organization, or in any other labor organization, or otherwise interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

WE WILL make whole Lester H. Slater for any loss of pay suffered as a result of the discrimination against him.

WE WILL reimburse our employees for the initiation fees and dues they were illegally required to pay to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 357, as a result of the unlawful hiring provisions in our contract with the aforementioned labor organization.

All our employees and prospective employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named union, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

LOS ANGELES-SEATTLE MOTOR EXPRESS,  
INCORPORATED

(Employer)

Dated ..... By .....  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

## APPENDIX B

### NOTICE

TO ALL EMPLOYEES OF AND APPLICANTS FOR EMPLOYMENT WITH  
LOS ANGELES-SEATTLE MOTOR EXPRESS, INCORPORATED

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise give effect to the provisions of any agreement with Los Angeles-Seattle Motor Express Incorporated, or with any other employer, which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment with any employer, upon referral or clearance by any labor organization, except as authorized by Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause the above-named employer, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8 (a) (3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

WE WILL reimburse the employees of Los Angeles-Seattle Motor Express, Incorporated, for the initiation fees and dues they were illegally required to pay to our union as a result of the unlawful hiring provisions in our contract with the aforementioned company.



WE WILL make whole Lester H. Slater for any loss of pay suffered as a result of the discrimination against him.

INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFERS, WAREHOUSEMEN AND  
HELPERS OF AMERICA, LOCAL 357  
(Labor Organization) /

Dated ..... By .....  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

### INTERMEDIATE REPORT AND RECOMMENDED ORDER

#### Statement of the Case

This proceeding, brought under Section 10 (b) of the National Labor Relations Act (61 Stat. 136), herein called the Act; against Los Angeles-Seattle Motor Express, Incorporated, herein called the Company or the Employer, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 347, AFL-CIO, herein called the Union, upon charges filed by Lester H. Slater, an individual, upon consolidated complaint and answers was heard before the undersigned Trial Examiner upon due notice in Los Angeles, California, on August 27, 30, 1956.

The complaint alleged in substance that the Employer on demand of the Union discharged Slater for reasons other than his failure to pay dues and initiation fees regularly required of all employees of the Employer and that Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (b) (2) were thereby violated by the Employer and

the Union respectively. In its answer the Union admitted that it requested Slater's discharge as alleged in the complaint but denied that this constituted a violation of the Act and adduced as affirmative defense that the request for discharge was based on Slater's violation of the valid provisions of the Union's contract with the Employer. The Employer in its answer denied generally the allegations with respect to Slater, except to admit that the Union demanded that the Employer refuse to employ Slater as a casual employee within the meaning of the Employer's contract with the Union.

The complaint alleged that the Employer and the Union had further violated these same sections of the Act, respectively, by "giving effect" to certain provisions of their bargaining agreement relating to seniority with respect to casual employees. The answers denied the alleged violation.

After the evidence had been taken there were oral statements on the issues, and the General Counsel has, since the close of the hearing, filed a brief with the undersigned.

Upon consideration of the entire record in the case and from my observation of the witnesses, I make the following:

#### FINDING OF FACT

##### I. The business of the Respondent Employer

The Respondent is a Washington corporation engaged in the business of trucking freight between points within the State of California and between points in California and other States. It renders services as a motor freight carrier in Western States under authority of regulatory commissions of the various States and the Interstate Commerce Commission, of a value in excess of \$1,000,000 annually.

It is admitted and found that the Respondent Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act for the Board to assert its jurisdiction herein.

## II. The labor organization involved

The Respondent Union is a labor organization within the meaning of Section 2, subsection (5) of the Act.

## III. The unfair labor practices

### A. *The Slater Incident*

On November 10, 1955, on demand of the Union the Employer discharged, or thereafter refused to employ, the charging party, Lester H. Slater, as a casual employee. On all material dates Slater was a member of the Union in good standing. He was not therefore denied employment for failure to tender periodic dues and initiation fees uniformly required as a condition of acquiring and retaining membership in the Union, and the Employer had knowledge of the basis for the Union's demand relative to Slater. These facts alone according to the General Counsel—as I understand his position—establish a violation of Section 8 (a) (3) and Section 8 (b) (2), respectively, by the Employer and the Union.

The defense is that Slater was not a regular but a casual employee and as such was required to obtain clearance through the Union's dispatching service as provided in the Union's contract with the Employer, and not having done so was lawfully subject to denial of employment as a casual employee until so dispatched. No question is raised as to the Union's representative status or the contract although, as will be seen hereinafter, certain practices under the contract relating to seniority are attacked. The provision relative to the dispatching service *qua* dispatching service, restricted as it was to casual employees, is admittedly valid. Admittedly Slater did not obtain the job in question through the normal regular procedures of the Union's dispatching service.

Assuming *arguendo* that Slater was in fact a casual employee I find, contrary to the General Counsel's position, that the Employer's refusal, on demand of the Union, to

continue to employ Slater as a casual employee unless and until he was dispatched to the job by the Union, constituted no violation of the Act on the part of either the Union or the Employer. I consider the decision in the *Furriers* case [*N. L. R. B. v. Furriers Joint Council, et al.*, 224 F. 2d 78 (C.A. 2,) 36 LRRM 2267] applicable to this issue. The court in that decision held, in substance, that employees have no protected right under Section 7 of the Act to violate the valid provisions of a collective bargaining contract. The following language from the court's decision in the *Furriers* case finds proper application here:

The Board's interpretation would have the effect of furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts. This we think is not consistent with the underlying purpose of the Act to promote the consummation of collective bargaining agreements as "the effective instrument of stabilizing labor relations and preventing through collective bargaining, strikes and industrial strife."

The rationale of this decision, it is remarked, presents nothing new or startling in juridical concepts on issues arising under the Act, but has its base in decisions reaching all the way back to the *Sands Manufacturing Co.* case, 306 U.S. 332, 344, and has been applied by the Board in numerous decisions exonerating employers from the charge of unfair labor practices, as where reinstatement has been denied to employees who have struck in violation of no-strike agreements.<sup>1</sup> The answer to the General Counsel's argument that if "the Union has any rights under its contract, when the Employer hires employees in violation of the contract, such rights are against the Employer, the violating party, not the employee," is contained in the

<sup>1</sup> "An employer may lawfully discharge or otherwise discipline employees for engaging in an unprotected strike. . . . *California Cotton Cooperative Association, Ltd.*, 110 NLRB 1494, 1500, citing *United Elastic Corporation*, 84 NLRB 768. See also Administrative Ruling of General Counsel, Case No. K-653, 38 LRRM 1418.

*Furriers* decision, and may be further disposed of by posing a question: Is there to be one rule in the case of an employer respondent and another conflicting, more restrictive, rule in the case of a union respondent?

I am aware of course that the *Furriers* decision was based solely on an alleged violation of Section 8 (b) (1) (A) of the Act, but the reasoning of that decision applies with equal cogency to the violations herein alleged with respect to Slater. In any event I concur in and adopt the language of the Trial Examiner in the *Furriers* case (108 NLRB 1506, 1520, 1521, 1522) with respect to his findings and conclusions on the alleged 8 (a) (3) and 8 (b) (2) violations in that case, from which I quote in part:

Once a union . . . has achieved its goal of writing employment conditions into a contract, and provided of course the conditions are not illegal themselves, their performance by employees may no longer be regarded in the statutory sense as assistance to the union or participation in its concerted activity from which employees are entitled to refrain. The entire scheme of the Act contemplates that when valid provisions governing employer-employee relations have been negotiated into contract form, such provisions are to be observed, not only by the union and the employer who sign the contract, but by all employees in the bargaining unit for whom the union acts as statutory agent, regardless of their membership or non-membership in the labor organization. And conduct engaged in by an employee in contravention or derogation of the contract . . . may not be found an activity protected under Section 7 of the Act. Nor, as a necessary corollary to that proposition, may reprisal measures taken by the union or employer against an employee for engaging in such conduct be found an infringement of the employee's statutorily protected rights.

Coming now to the General Counsel's further contention that Slater was not a casual but a regular employee, and therefore was not subject to the dispatching hall provisions

of the contract, it is clear that if the General Counsel is right on the facts he is also right on the law, for the Union's demand and the Employer's compliance with it can only be justified under the contract, and the contract provides that only casual employees are required to be dispatched by the Union. I do not, however, think that the General Counsel is right on the facts, for I am convinced that Slater was a casual employee within the meaning of the contract. As such he was indeed also an employee within the meaning of the Act and that, it appears, is all that is established in *Union County Newsdealers Supply Co.*, 114 NLRB No. 247, cited by the General Counsel in support of his position.

Apparently it is the General Counsel's position that in determining whether Slater was a casual employee and therefore subject to the contract, we should ignore the intent of the contracting parties for it can hardly be doubted on the evidence that the parties intended that employees of his employment status should be subject to the contractual provisions relating to casual employees. Of course it would be permissible to show that Slater could not reasonably have been placed in the category of casual employees, and therefore the parties could not have intended to include him in that category, but there is no evidence that he was singled out and subjected to discriminatory treatment, and I can hardly conceive of any reason why he should have been. Obviously the contracting parties could have made the dispatching service applicable to regular as well as casual employees and it would have made no change in the legality of such a provision, and since Slater was a member of the Union in good standing, what motive would the Union have had for insisting that his employment status was casual rather than regular if that was indeed not the fact? As a matter of fact, the Union informed the Employer and informed Slater that if the Employer wanted to employ the latter as a regular employee, it had no objection. Therefore it never demanded that Slater be denied em-



ployment as a regular employee, but only as a casual employee subject to the dispatching requirements of the contract.

Did I agree with the General Counsel that in construing the contract we should ignore the intent of the parties and independently determine whether Slater was a casual employee, I still would be compelled to find that a heavy preponderance of the evidence places him in the casual employee category. In support of his position, the General Counsel refers to Slater's employment record which shows, as stated in the General Counsel's brief, that he was hired by the Employer on August 27, 1955; that he worked 4 hours that night and was paid that night; that he worked 36 hours during the week ending September 3, for which he was paid in two checks, the first for 20 hours and the second for 16; that he worked 32 hours for the weeks ending September 10, September 17 and September 24, with some overtime for each of those weeks; and that for all of the weeks between October 1 and November 5, 1955, he worked 40 hours, with the exception of the week ending October 8 when he worked 36. November 10, the last day he worked, was a Thursday, and he had worked the preceding Monday and Tuesday but not Wednesday.

What this shows, and all it shows, is that during the last few weeks of his employment he worked fairly regularly, but it is a well known fact that casual or extra employees during seasons when the work load is exceptionally heavy may work with a considerable degree of regularity and may indeed be employed overtime without acquiring the status of regular employees. The General Counsel admits that Slater started as a casual or extra employee but apparently contends that as soon as he was given work equivalent to a 40-hour week he became a regular employee. The fact is that at no time did Slater fill out a written application for employment, or undergo a physical examination, or comply with bonding requirements—all required of a regular employee. His check stubs all bore the notation "extra em-



ployee" and he admitted that at least during all but the last weeks of his employment it was customary for him to ask his foreman each day if he would be needed on the following day and while, according to him, he did not continue this practice during the final two or three weeks of his employment, but just "kept coming in," he testified on cross-examination:

Q. How did you find out you were going to work the next day? A. I didn't.

Q. Did you just come down? A. Yes, if he [the foreman] didn't need me he'd probably tell right then.

Q. In other words, the last two or three weeks you just sort of took a chance? A. Yes.

Obviously, regular employees with regular jobs do not just "take a chance" of employment or reporting for work. It further appears that Slater worked variously on different shifts, split shifts, and received no pay for holidays such as Labor Day when he did not work—all factors distinguishing his status from that of regular employees. His work card was kept in a rack reserved for extra employees whereas work cards of regular employees were kept in a separate compartment.

From the foregoing it is clear and is found that the contracting parties reasonably regarded Slater as a casual employee subject to the hiring hall provisions of the contract and that he was subject to those provisions. The factual problem remains whether he was dispatched to his job with this Employer as required by the contract. It is clear that he was not.

Slater obtained his employment by presenting the Employer with a letter signed by an officer of the Union stating that he might seek work wherever he could find it in the freight industry without working through the hiring hall. This letter may very well have misled the Employer into believing that the Union had waived the requirement that

in seeking *casual* employment Slater be dispatched through regular procedures, but Slater, who had worked out of the hiring hall for some 2 years, knew very well that in his use of this letter he was circumventing regular hiring hall procedures. The letter did not in fact constitute a referral according to the contractual provision relating to casual employees and practices under it, and when an officer of the Union responsible for the application of hiring hall procedures found that Slater was working without proper referrals he called that fact to the attention of the Employer and demanded that the Employer cease to employ Slater as a casual employee except on the basis of proper referrals. The Employer promptly honored the request. It could not have acted otherwise except with a deliberate breach of contract. This action left the Employer free, as it is now, to apply its own judgment and discretion whether to employ Slater as a regular employee.

## 2. The Contract

The Employer is a member of the California Trucking Associations, Inc., herein called the Association, an association of motor truck operators which has, among others, the function of representing its various employer members, including the Respondent Employer, in collective bargaining with representatives of their employees. On about May 1, 1955, the Association executed a contract known as the Master Dry Freight Agreement, with the Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and a number of its affiliated local unions, including the Respondent Union (Local 357). This contract is operative for a period of three years commencing May 1, 1955. It is not disputed that the Association, its employer members and the unions signatory to the contract have at all times material herein given effect to the terms of the contract.

This contract provides:

The Association recognizes the Union as the exclusive representative of the employees covered by this Agreement for collective bargaining. As a condition of employment, after thirty (30) days from the effective date of this Agreement, or after thirty (30) days from the date an employee is hired, whichever is later, all employees covered by this Agreement shall be required to become and remain members of the Union in good standing. New employees shall, when permitted by law, or in case of employers not subject to the National Labor Relations Act, become members of the Union fifteen (15) days from the date of original employment. Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union.

Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available; or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

The sole issue with respect to the contract is whether under it the Employer has surrendered to the Union control of seniority governing the dispatching of casual employees. On the fact of the contract I can find nothing violative of the Act in the language relating to seniority and no contention is made, and no evidence proffered by the Gen-

eral Counsel to show that the Union has in any way discriminated against nonunion members in its application of the seniority provisions of the contract. The General Counsel's authority for his position is *Pacific Intermountain Express Company*, 107 NLRB 837, in which the Board after finding that "the objective standards for determining seniority are derived from information peculiarly within the knowledge of the employer," held:

We can therefore see no basis for presuming that when an employer delegates to a union the authority to determine the seniority of its employees, or even to settle controversies with respect to seniority, such control will be exercised by the union in a nondiscriminatory manner. Rather, it is to be presumed, we believe, that such delegation is intended to, and in fact will, be used by the union to encourage membership in the union. Accordingly, the inclusion of a bare provision like that in the 1949 contract, that delegates *complete control* over seniority to a union is violative of the Act because it tends to encourage membership in the union. And because we believe that it will similarly tend to encourage membership in the union, we also conclude that the inclusion of a statement, like that in the 1952 contract, that seniority will be determined without regard to union membership is not by itself enough to cure the vice of giving to the union complete control over the settlement of a "controversy" with respect to seniority. (Emphasis supplied.)

It is seen that this decision rests on a presumption that a labor organization which through collective bargaining wins a concession from an employer vesting the former with control of seniority, will exercise such control in a discriminatory manner, and that this in turn will encourage membership in the labor organization. Needless to say, any concession won by a labor organization at the bargaining table may be said to encourage membership in that labor organization and to say that a union is estopped from gaining benefits through collective bargaining which will have the reasonable effect of promoting membership in the

union, would be to make a mockery of the whole bargaining process. Obviously, therefore, the Board has seen some special danger to the rights of employees where a union is permitted to control seniority, even though such control arises out of bargaining agreements. The presumption that if given such control it will be exercised in an unlawful manner, where no evidence exists that it has been exercised in an unlawful manner, is perhaps a bit novel in American jurisprudence but the two courts which have passed on it have approved the doctrine. *N.L.R.B. v. Pacific Intermountain Express Company*, 225 F. 2d 343, 36 LRRM 2632 (C.A. 8); *N.L.R.B. v. Dallas General Drivers*, No. 15589 (C.A. 5), 37 LRRM 2356. It still may be questioned, without disrespect to either the Board or the courts, whether the presumption, unless it be an irrebuttable one, may have proper application in a situation where, as here, the labor organization involved is not shown to have engaged in discriminatory practices with respect to seniority after more than a year of operations under the contract. There are other grounds, however, on which I would distinguish the cases.

In the case at bar, unlike *Pacific Intermountain Express*, not the Union alone but the Union and the Employer as contracting parties have established a standard in the contract for determining placement on the seniority lists. "This standard is unequivocally expressed in the provision that seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union." Here there is no unilateral determination by the Union as to what persons shall be placed on the seniority list, or the order of their placement.

The standard for removal of employees from the seniority lists is also provided by the contract; namely, the discharge "of any employee by any employer." Now, it can hardly be presumed that the Union controls the discharge of employees at the hands of their employers and therefore

unilaterally determines the standard for removal from seniority lists. Its discretion in removal of employees from the seniority lists is therefore restricted by a circumstance over which it has no control.

Clearly we do not have here a "bare provision" on seniority comparable to that found in the *Pacific Intermountain Express* case, and clearly there is not here such a delegation of "complete control" over seniority to the Union as was found in that case. Nor is seniority made subject to "the rules and regulations of the Union," a provision disapproved by the Board in *Interstate Motor Freight System*, 116 NLRB No. 95. The situation here appears to be much closer to that found in the *Interstate* case relating to a third contract with respect to which no violation was found because in it seniority was spelled out more fully than in the other two contracts found to have contained unlawful seniority provisions, and it did not make the principle of seniority "subject to the rules and regulations of the Union."

The General Counsel's main reliance appears to be the fact that the Union has the ministerial function of compiling and maintaining the seniority lists. True, in most cases where a single union and a single employer are involved in contractual relationships, it is the employer who compiles and maintains the seniority lists, and it is not and could not be presumed that he will exercise this function in a discriminatory manner, even though it be shown that he has the strongest of anti-union biases. There is even some question whether, except in special circumstances, he can be required to furnish his employees' bargaining agent with a copy of such lists as a part of the bargaining process. See *N.L.R.B. v. F. W. Woolworth Co.*, (C.A. 9), No. 14577, June 25, 1956; 38 LRRM 2362. Here, however, while the complaint runs against a single union and a single employer, the contract which is under attack is a master labor agreement between the Association representing approximately 1,000 trucking firms, and the Union together with other



affiliated local unions. Bearing in mind that seniority as spelled out in the contract is based on a minimum of three months service in the *industry*, it would hardly be seemly to require this Employer to maintain a seniority list of the entire affected industry. In fact it would be impractical if not impossible for it to do so. And it is this Employer alone and this Union alone that are here charged with unfair labor practices.

The Association doubtless has access to the employment records of all its members, and therefore presumably could compile a list such as is now maintained by the Union, which lists could then be made available to its members, such as the Employer in this case. This could be done, though no doubt at considerable expense and inconvenience, and it has not been done. Perhaps this would be a good idea and a salutary one, but unless we are to earn the appellation of bureaucratic intermeddlers this is not our proper concern unless we can say that the Association's failure to take such action vitiates the contractual provision on seniority. I think, under the circumstances of this case, we can not say that. The contracting parties have seen fit, though collective bargaining, to leave the compilation and maintenance of such lists to the Union, but, as aforesaid, the *standards* for determining seniority have been set forth in the contract.

As stated by the General Counsel, the seniority lists maintained by the Union have not been furnished to the Employer or the Association, but this is not to say that they would not be furnished on appropriate request for there is no showing that a request has been made by either. Nor can I see much significance in the fact that neither the Employer nor the Association have intervened in any dispute over seniority arising under the contract, because it is not shown that any dispute over seniority has arisen or has been called to the attention of either. Is this also a fact not in evidence which we are to assume? The fact is that in any dispute arising over seniority, the Employer is not impotent be-



cause it can obtain, independently of the Union, data on the seniority status of employees through the Association, and inasmuch as the standards for establishing and terminating seniority are set up in the contract, it is in position to challenge the Union's disposition of such matters if it is of the opinion that the standards of the contract are not being adhered to. This is a far cry from the "complete control" over seniority accorded the Union in the *Pacific Intermountain Express* case. To presume in this situation that because the Union is empowered to compile and maintain a seniority list in accordance with standards specifically named in the contract, it will violate its contractual obligations with respect to observance of those standards, without any evidence whatever that it has done so, would be to indict labor organizations generally as unfit to undertake contractual obligations on behalf of employees they represent. I would not willingly join in such an indictment.

It will be my recommendation that the complaint be dismissed in its entirety.

#### Conclusions of Law

1. The operations of the Respondent Employer, described in Section I above, constitute and affect trade, traffic, and commerce among the several States, within the meaning of Section 2 (6) and (7) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. The Respondents have not engaged in unfair labor practices as alleged in the complaint.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the complaint herein be dismissed.

Dated this 9th day of October 1956.

WILLIAM E. SPENCER  
Trial Examiner

**GENERAL COUNSEL EXHIBIT II**  
**MASTER LABOR AGREEMENT**  
**BETWEEN**  
**CALIFORNIA TRUCKING ASSOCIATIONS, INC.**  
**AND**  
**THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**  
**CHAUFFEURS, WAREHOUSEMEN**  
**AND HELPERS OF AMERICA**  
**(Joint Council of Teamsters No. 42)**

This Agreement entered into this 1st day of May, 1955, between CALIFORNIA TRUCKING ASSOCIATIONS, INC., hereinafter referred to as Association, and the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and its affiliated Local Unions Nos. 88, 186, 208, 224, 357, 381, 396, 467, 495, 542, 578, 631, 692, 898 and 982, hereinafter collectively referred to as UNION.

. . . . .

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. The Association recognizes the Union as the exclusive representative of the employees covered by this Agreement for collective bargaining. As a condition of employment, after thirty (30) days from the effective date of this Agreement, or after thirty (30) days from the date an employee is hired, whichever is later, all employees covered by this Agreement shall be required to become and remain members of the Union in good standing. New employees shall, when permitted by law, or in case of employers not subject to the National Labor Relations Act, become members of the Union fifteen (15) days from the date of original employment. Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any emp-

ployer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months' service in the Industry, irrespective of whether such employee is or is not a member of the Union.

Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

3. The right is reserved by the members of the Association to discharge any employee for services not deemed by the employer to be satisfactory, and further to assign employees covered by this Agreement to any classification of employment, and to determine how and when freight shall be moved and number of employees necessary for the performance of any particular task or service. No employee shall be discharged or discriminated against because of his membership in the Union or Union activities. The Union shall have the right to investigate the discharge of any employee and may protest any discharge believed by the Union to be unjustified. Any such protest shall be presented to the Association within five (5) days after such discharge. Thereupon the matter shall be investigated by a joint committee composed of three representatives of the Union and three representatives of the Association. The decision of a majority of said joint committee shall be binding upon the employer and employee involved. In the event of the failure of a majority of said committee to

reach a decision, the discharge will remain in effect and no further proceedings will be had in connection with such matter.

4. In the event of the reduction in the number of employees by any member of the Association, employees shall be laid off according to the seniority list. In the event of an increase in the number of employees by a member of the Association, employees previously laid off shall be restored to duty according to their seniority provided the affected employee responds to the call of the employer, which call shall be communicated to the employee at his last known address as filed with the employer, by straight telegram and to the local union by telegraph or telephone, and reports for duty within twenty-four (24) hours from the time of the dispatch of said call. The giving of said aforementioned call shall fulfill the obligation of the employer under the provisions of this Agreement. The Union and the Association shall develop and establish rules for the determination of seniority within and between units, departments, and branches of members of the Association, the preparation and posting of seniority lists, the definition of the types of temporary layoff which will not be affected by this paragraph, and such other matters as may be found necessary for the application of the provisions of this paragraph. Extra work and overtime, insofar as possible, will be assigned on a rotating basis without regard for seniority.

. . . . .

12. The parties hereto recognize and agree that industrial peace is to be desired at all times in the area covered by this Agreement and to that end it is agreed that for the purpose of adjusting differences, misunderstandings, disputes or controversies arising under the provisions of this Agreement or of any agreements supplemental hereto, as follows:

- (a) In the event of any difference, misunderstanding, dispute or controversy, the parties shall exercise

every amicable means to settle or adjust the same, but in the event of their failure so to do, such difference, misunderstanding, dispute, or controversy, shall be submitted to a Board of Arbitration, and the decision of such Board shall be binding upon the parties and their members.

- (b) The Board of Arbitration shall consist of one member selected by the Association and one member selected by the Union, and a disinterested third member to be selected by the two members selected by the parties in the event that the first two members cannot agree upon a decision. In the event that the two members selected by the parties fail to agree upon a third member within ten (10) days, such third member shall be designated by the American Arbitration Association. In case there are three members of the Board of Arbitration selected as above-mentioned, a decision concurred in by any two of them shall constitute an award of the Board.
- (c) Any matter to be considered by the Board of Arbitration shall be submitted to it in writing by the party originally requesting arbitration. The Board of Arbitration shall meet within ten (10) days thereafter, at which time the parties shall present their evidence. Unless an extension is mutually agreed upon by the parties, the Board of Arbitration shall render its decision in writing within twenty (20) days after final submission of the matter to it.
- (d) The expense of the Board of Arbitration shall be borne equally by the parties hereto.
- (e) Questions as to the amount of money due any employee under an existing wage scale, not involving any interpretation of this agreement or any agreement supplemental hereto, need not be submitted to arbitration. Complaints involving only the amount of money due an employee shall be submitted to the Association for investigation and adjustment and every amicable means shall be exercised to effect a settlement or adjustment of such complaint. If any such complaint shall not have been adjusted or settled to the satisfaction of the parties concerned within five (5) days, exclusive of Saturdays, Sun-

days, and holidays, of the submission of the complaint to the Association, the Union shall have the right to take such action against the member of the Association involved as it may deem proper. If such complaint shall not be adjusted or settled to the satisfaction of all parties concerned, the member of the Association against whom such complaint is made may pay under protest the full amount of money claimed to be due and thereupon the Association may refer such matter to the Board of Arbitration for determination.

17. The term of this Agreement shall be three years commencing May 1, 1955.

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

**CALIFORNIA TRUCKING ASSOCIATIONS, INC.**

H. B. HOLT, *President*

J. J. DEVINE, *Secretary*

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA**

PAT L. D. JONES  
Joint Council of  
Teamsters No. 42  
RICHARD W. FLYNN  
Local Union No. 88  
ROBERT D. USSERY  
Local Union No. 186  
JOHN W. FILIPOFF  
Local Union No. 208  
H. E. WOXBERG  
by W. F. DYKES  
Local Union No. 224  
A. W. BOCK  
Local Union No. 357  
WALTER A. CALLAHAN  
Local Union No. 381  
FRANK J. MATULA, JR.  
Local Union No. 396

STEWART B. MASON  
Local Union No. 467  
FRANK A. HATFIELD  
Local Union No. 495  
J. P. POTEET  
Local Union No. 542  
HOWARD L. BARKER  
Local Union No. 578  
WM. F. CARTER  
Local Union No. 631  
TED MERRILL  
Local Union No. 692  
RICHARD P. GIBBONS  
Local Union No. 898  
L. O. WILSON  
Local Union No. 982



## GENERAL COUNCIL EXHIBIT NO. 4

JOHN M. ANNAND

INTERNATIONAL  
REPRESENTATIVE346 SOUTH UNION AVENUE  
LOS ANGELES 14, CALIFORNIA  
TELEPHONE: DUANE 77961INTERNATIONAL BROTHERHOOD OF TEAMSTERS  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS

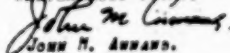
July 7, 1935

Mr. Lester Slater,  
932 No. Eucalyptus Ave.,  
Inglewood, California.

Dear Sir and Brothers:

MR. GODY'S LETTER TO OUR INTERNATIONAL PRESIDENT, DAVE BECK, WAS REFERRED TO ME. I HAVE BEEN INFORMED BY LOCAL UNION 357 THAT YOU DO NOT DESIRE STEADY WORK, AND THAT FOR THIS REASON THEY HAVE FOUND IT SOMEWHAT EMBARRASSING TO DISPATCH YOU FROM THE HIRING HALL. HOWEVER, THEY INFORMED ME THAT YOUR CARD IS IN ORDER, AND THAT YOU MAY SEEK WORK WHENEVER YOU CAN FIND IT IN THE FREIGHT INDUSTRY WITHOUT WORKING THROUGH THE HIRING HALL.

Respectfully yours,



JOHN M. ANNAND.

THAIED

(ENCLOSURES)

OVER.

Lester Slater will take a steady job any time, I know this to be true. Mrs. Gody.

Mrs. Gody  
932 No Eucalyptus Ave.  
Inglewood Calif  
Phone. CR 1-5394



One must be a true national character to do anything  
 Sweet Patrick said in his letter to people:

Dear Patrick

To help a man when he is down even  
 if he will never know. By the

NATIONAL LITERATURE BOARD

1934-1935

1934-1935

1934-1935

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[fol. 69] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,  
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Petition for Review of Order of the National Labor  
Relations Board and Cross-Application for Enforcement.

OPINION—Decided February 18, 1960

Mr. Bernard Dunau, with whom Messrs. Herbert S. Thatcher and David Previant were on the brief, for petitioner.

Miss Rosanna A. Blake, Attorney, National Labor Relations Board, with whom Messrs. Jerome D. Fenton, General Counsel, National Labor Relations Board at the time the brief was filed, Thomas J. McDermott, Associate General Counsel, National Labor Relations Board, and Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, and Mrs. Betty Jane Southard, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before Edgerton, Wilbur K. Miller and Danaher, Circuit Judges.

[fol. 70] Per Curiam: Local 357 of the Teamsters union asks us to review and set aside, and the National Labor Relations Board asks us to enforce, an order of the latter which held an exclusive hiring hall agreement constitutes discrimination which encourages union membership within the meaning of Sections 8(a)(3) and (1) and 8(b)(2)

and (1)(A) of the National Labor Relations Act as amended, 61 Stat. 136, 65 Stat. 601, 29 U. S. C. § 158. The order directed the respondent employer, Los Angeles Seattle Motor Express, and the union to cease and desist from performing, maintaining or otherwise giving effect to the condemned hiring hall agreement and to take certain affirmative action which the Board found would effectuate the purposes of the Act.

Among the affirmative acts which the order required of the union and employer jointly was to make whole one Lester H. Slater for any loss he may have suffered from the discrimination which the Board held had been practiced against him under the hiring hall agreement; and to reimburse all casual employees for the initiation fees and dues which, the Board said, had been "exact[ed] from them as the price of their employment."

We think the Board's order is correct except that it goes too far in directing reimbursement of the dues and fees paid to the union by all casual employees. *National Labor Relations Board v. American Dredging Co.*, — F. (2d) — (3rd Cir. Jan. 8, 1960).<sup>1</sup> The order should be modified to confine the reimbursement feature to Slater alone. As so modified, the Board's order will be enforced.

It is so ordered.

[fol. 71] *EDGERTON, Circuit Judge, dissenting:* The Board rightly says "The basic issue in this case is the propriety of the Board's finding that the Union's exclusive hiring hall agreement violated the Act on its face." I think this finding is wrong and the order should be set aside.

The court appears to hold that an exclusive hiring-hall agreement is necessarily unlawful. My impression is that "The hiring hall is legal and has always been held so." *N.L.R.B. v. Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 429 (9th Cir. 1959). An "agreement that hiring of employees be done only

<sup>1</sup> We have considered the opinion of the Seventh Circuit in *National Labor Relations Board v. Local 60, et al.*, — F. (2d) — (Jan. 22, 1960), but are constrained to the view that the

Third Circuit opinion more aptly applies to the problem presented on the record before us.

through a particular union's offices does not violate the Act "absent evidence that the union unlawfully discriminated in supplying the company with personnel." 95 N.L.R.B. at 435." *N.L.R.B. v. Swinerton*, 202 F. 2d 511, 514 (9th Cir.), *cert. denied* 346 U.S. 814. "The factor in a hiring-hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Co. v. N.L.R.B.*, 8 Cir., 1952, 196 F. 2d 841, 845." *Eichleay Corp. v. N.L.R.B.*, 206 F. 2d 799, 803 (3d Cir. 1953). The present hiring-hall arrangement expressly negatives any such agreement, by requiring employment to be "only on a seniority basis" irrespective of whether the "employee is or is not a member of the Union." Without violating this agreement, the employer cannot discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership" in the union, in violation of § 8(a)(3) of the Labor Management Relations Act,<sup>1</sup> and the union cannot "cause or attempt to cause an employer to discriminate against an employee in violation of" that section.<sup>2</sup>

[fol. 72] The agreement does not contain the language the Board required in the *Mountain Pacific* case, 119 N.L.R.B. 883, 897, but this does not make it unlawful. *N.L.R.B. v. Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 431 (9th Cir.). "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed." *Local 24 Internat'l Brotherhood of Teamsters etc. v. Oliver*, 358 U.S. 283, 295. The possibility that the arrangement may at some future time lead to unlawful discrimination does not invalidate it. *Shuttlesworth v. Board of Education*, 358 U.S. 101, *affirming* 162 F. Supp. 372, 384.

The court upholds the Board's finding that the discharge of employee Slater resulted from the hiring provisions of the contract and was discriminatory. Slater

<sup>1</sup> 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1958).

<sup>2</sup> § 158(b)(2).

had not obtained or sought employment through the hiring hall. I think his discharge for this reason did not discriminate against him or violate the Act. To interpret the Act as "furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts" would not be "consistent with the underlying purpose of the Act to promote . . . collective bargaining agreements . . ." *N.L.R.B. v. Furrier's Joint Council*, 224 F. 2d 78, 80 (2d Cir.). Slater was a member of the Union in good standing. I cannot see that his discharge for failing to comply with an agreement between the Union and the employer encourages union membership.

[fol. 73].

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,  
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

On Petition for Review of Order of the National Labor  
Relations Board and Cross-Petition for Enforcement.

Before: Edgerton, Wilbur K. Miller and Danahef, Cir-  
cuit Judges.

JUDGMENT—February 18, 1960

This case came on to be heard on the record from the  
National Labor Relations Board, and was argued by  
counsel.

On Consideration Whereof, It is ordered and adjudged  
by this court that the order of the National Labor Relations

Board on review in this case be modified as indicated in the opinion of this court and, as so modified, will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion and judgment of this court.

Per Curiam.

Dated: February 18, 1960.

Separate dissenting opinion by Circuit Judge Edgerton.

[fol. 74] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
No. 14,794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,  
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; Respondent.

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL  
LABOR RELATIONS BOARD—March 10, 1960

Before: Edgerton, Wilbur K. Miller and Danaher, Circuit Judges.

This cause came on to be heard upon the petition of Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to review an order of the National Labor Relations Board dated October 31, 1958, and upon the Board's cross-application to enforce said order. The Court heard argument of respective counsel on September 16, 1959, and has considered the briefs and transcript of record filed in this cause. On February 18, 1960, the Court being fully advised in the

premises, handed down its decision granting enforcement of the Board's order as modified and granting in part and denying in part the petition to review. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed by the Court, that the petitioning Union, Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to provisions of any agreement with Los Angeles-Seattle Motor Express, Incorporated (hereinafter called the Company), or any other employer within the meaning [fol. 75] of the National Labor Relations Act (hereinafter called the Act), which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment with any employer, upon referral or clearance by the Petitioner Union, except as authorized by the proviso to Section 8 (a) (3) of the Act;

(2) Causing or attempting to cause the Company, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8 (a) (3) of the Act;

(3) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act;

(b) Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Jointly and severally with the Company, make whole Lester H. Slater for any loss of pay he may have suffered by reason of the discrimination against him, as provided in the Section of the National Labor Relations Board's Decision and Order, dated October 31, 1958, entitled "The Remedy";

(2) Jointly and severally with the Company, reimburse Lester H. Slater for monies illegally exacted from



him in the manner and to the extent set forth in the aforesaid Decision and Order.

(3) Notify Lester H. Slater and the Company, in writing, that it has no objection to Slater's employment;

(4) Post at its offices, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Twenty-first Region (Los Angeles, California), shall, after being duly signed by Petitioner's representative, be posted immediately upon receipt thereof and maintained by the Petitioner for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Petitioner to insure that said notice shall not be altered, defaced, or covered by any other material;

[fol. 76] (4) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this decree, what steps it has taken to comply herewith.

Wilbur K. Miller, Judge, United States Court of Appeals for the District of Columbia Circuit,  
John A. Danaher, Judge, United States Court of Appeals for the District of Columbia Circuit.

Circuit Judge Edgerton dissents.

Dated: March 10, 1960.

[fol. 77]

# APPENDIX A TO DECREE

## NOTICE

TO ALL EMPLOYEES OF AND APPLICANTS  
FOR EMPLOYMENT WITH LOS ANGELES-  
SEATTLE MOTOR EXPRESS, INCORPORATED

## PURSUANT TO

a Decree of the United States Court of Appeals enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National

Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise give effect to the provisions of any agreement with Los Angeles-Seattle Motor Express Incorporated, or with any other employer, which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment with any employer, upon referral or clearance by any labor organization, except as authorized by Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause the above-named employer, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8 (a) (3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

WE WILL reimburse Lester H. Slater for the initiation fees and dues he was illegally required to pay to our union as a result of the unlawful hiring provisions in our contract with the aforementioned company.

WE WILL make whole Lester H. Slater for any loss of pay suffered as a result of the discrimination against him.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA, LOCAL 357

(Labor Organization)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Vol. 79] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 80]

## SUPREME COURT OF THE UNITED STATES

No. 825, October Term, 1959

LOCAL 357 INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,  
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

## ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 929 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 81]

## SUPREME COURT OF THE UNITED STATES

No. 929, October Term, 1959

---

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

---

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 825 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED

MAR 28 1950

JAMES R. BROWNING, C.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1950

NO. ~~225~~ 64

LOCAL 357, INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA

Petitioner,

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

HERBERT S. THATCHER  
1009 Tower Building,  
Washington 5, D. C.

DAVID PREVANT  
511 Warner Building  
Milwaukee, Wisconsin

CHARLES HACKLER  
1046 West Ninth Street  
Los Angeles, California

*Attorneys for Petitioner*

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**IN THE**

**OCTOBER TERM, 1959**

**LOCAL 357, INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA.**

**Petitioner,**

**THE NATIONAL LABOR RELATIONS BOARD,**

**Respondent.**

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on February 18, 1960. Such judgment affirmed an order of the National Labor Relations Board directing petitioner to cease and desist from performing, maintaining or otherwise giving effect to a hiring hall or referral-of-employees agreement which allegedly violated Sections 8(a)(3), 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act, as amended, and to make one Lester H. Slater whole for any loss he may have suffered because of the discrimination allegedly practiced against him under the referral agreement.

**OPINION BELOW**

The Opinion of the Court of Appeals below is not yet reported and is attached hereto as Appendix A. See also R. 69.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on February 18, 1960, and the decree on March 10, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

## **QUESTION PRESENTED**

Whether an agreement between a union and an employer that employment of casual workers shall be obtained solely upon referral from a non-discriminatory dispatching service operated by the union is violative of the National Labor Relations Act on its face, and whether any such referral or hiring agreement must be deemed invalid if it does not explicitly incorporate the following three requirements formulated by the National Labor Relations Board: (1) selection of applicants for referral to jobs shall be on a nondiscriminatory basis, (2) the employer retains the right to reject any job applicant referred by the union, and (3) the parties to the agreement post notices of all the provisions relating to the functioning of the hiring arrangement.

## **STATUTES INVOLVED**

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Section 151, et seq.), are Sections 7, 8(a)(1) and (3), 8(b)(1)(A), 8(b)(2):

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

"(2) to cause or attempt to cause an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership":

### STATEMENT

#### A. *The Facts*

Petitioner Local 357 is a local labor organization located in Los Angeles, California, and is affiliated with the International Brotherhood of Teamsters. About May 1, 1955, petitioner, together with fifteen other affiliated Teamster Local Unions on the West Coast, and the International Brotherhood, entered into a collective bargaining contract known as the "Master Dry Freight Agreement" with California Trucking Association, Inc., an association of motor truck operators (R. 55; 62-66). The Association executed this master agreement on behalf of about one thousand trucking firms of which Los Angeles—Seattle Motor Express, Inc., herein called the Company, is one (R. 55-60). The agreement was for a three year term commencing May 1, 1955 (R. 55).

4

The agreement provided that, with respect to those employers who operated within the territorial jurisdiction of a local union which maintained a dispatching service, the employers were to hire *casual* employees solely through the dispatching service unless such workers were unavailable from that source (R. 37, 49, 56; 62-63). The agreement stated this requirement in the following terms (R. 62-63):

Casual employees shall, wherever the Union maintains a dispatching service, be employed *only on a seniority basis* in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party of this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, *irrespective of whether such employee is or is not a member of the Union.* (Emphasis supplied.)

Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

Lester H. Slater was a member in good standing of petitioner Local 357 (R. 49). For some two years he had secured casual employment through the dispatching service maintained by Local 357 (R. 55). However, on August 27, 1955, he obtained employment with the Company as a casual employee without clearance through the dispatching service (R. 49, 54-55). On November 10, 1955, upon learning that Slater had secured casual employment without referral from the dispatching service, an officer of Local

357 responsible for maintaining observance of the agreement requested the Company to cease employing Slater as a casual employee except on proper referral through the dispatching service (R. 39, 49-50, 55). The Company honored the request in accordance with its agreement (*ibid.*). The Company had originally hired Slater as a casual employee without referral from the dispatching service based on a misapprehension that Local 357 had authorized Slater to seek casual employment by means other than recourse to the dispatching service (R. 54-55). Local 357 informed the Company and Slater that it had no objection to the Company's direct hire of Slater as a *regular* employee if it so desired, the requirement of referral through the dispatching service applying only to casual employment (R. 52).

There was no evidence or even claim that Local 357 applied the dispatching service in a discriminatory fashion for the more than one year that it had been in operation (R. 56-57, 58).

### B. *The Proceedings Below*

Upon the filing of charges by Slater, the Board issued a complaint against petitioner and against the Company, alleging that the entering into and maintaining of the referral system, and the discharge of Slater upon his refusal to apply for employment as a casual employee through such referral system, constituted a violation of Sections 8(a)(3), 8(b)(2), 8(a)(1), and 8(b)(1)(A) of the Act. Following a hearing, the Trial Examiner in the case recommended dismissal of the complaint. R. 47 et seq. The Board reversed, finding that the agreement relating to the hiring or referral of casual employees was invalid on its face as constituting an "inherent and unlawful encouragement of union membership" absent express provisions in the agreement that: (1) selection of applicants to be on a non-discriminatory basis; (2) the employer retain the right to reject any applicant; (3) the parties post notices of the

hiring or referral arrangement. The Board rested this conclusion upon its then recent decision in *Mountain Pacific Chapter of the Associated General Contractors*, 419 NLRB 883, (R. 37.) The reasoning which the Board followed in the *Mountain Pacific* and instant cases can fairly be summarized as follows: The agreement vests in the union exclusive authority to refer employees for casual employment; "it is reasonable to infer" that the union will exercise its authority discriminatorily by denying referral to employees because of nonmembership or default in the performance of a membership obligation; this anticipated discrimination in employment in the operation of the dispatching service encourages union membership by inducing employees to join the union and adhere to its rules in order to avoid loss of work from incurrence of the union's displeasure.

Board Member Mirdock (who did not participate in the instant case) dissented in *Mountain Pacific* (id. at 887-891) on the ground that it had been well established in the law that the hiring hall is not per se unlawful and was condemned only when it had been proved that the hiring hall was in fact operated in a discriminatory manner, and that for the Board to presume that an otherwise lawful contract will be operated in an unlawful manner unless the contract includes certain Board announced objective criteria which will explain and justify the exclusive aspects of hiring hall referrals "amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation." (id. at 890).

The Board in the instant case further concluded, based on its foundation finding that the requirement of referral for casual employment through the dispatching service was unlawful per se, that the Company's denial of casual employment to Slater, based on Local 357's request except on proper referral, constituted a violation of Section 8(a)



(3) and (1) of the Act by the Company and a violation of Section 8(b)(2) and (1)(A) by Local 357 (R. 39).

The Board entered an order against the Company and Local 357 requiring *inter alia* that (1) they cease giving effect to any agreement "which unlawfully conditions the hire of applicants for employment, or the retention of employees, upon referral or clearance" by a labor organization; (2) they jointly and severally reimburse Slater for any loss sustained by him by reason of the referral requirement; and (3) they jointly and severally reimburse all casual employees for any initiation fees and dues paid by them to Local 357 beginning with the period six months preceding the filing and service of the charge (R. 39-44).

Local 357 thereafter petitioned the court below for review of the Board's Decision and Order, and on February 18, 1960, a majority of that court (Judges Wilbur K. Miller and Danaher) in a *per curiam* decision which did not discuss the issue, affirmed the Board's decision and order except as to that portion of the order directing reimbursement of dues and fees paid to the union by all casual employees. Judge Edgerton, while concurring in the action of the majority in refusing to require such reimbursement of dues and fees, dissented from the majority's upholding of the Board's conclusion that the union's exclusive hiring hall or referral agreement violated the Act on its face. The basis for his dissent and for his conclusion that the Board's order should be set aside was as follows: Union hiring hall agreements or their equivalents have consistently been held to be legal under the Act absent evidence that the union in fact practiced discrimination thereunder. In this instant case not only was there no showing or attempt to show any discrimination in practice but the hiring hall or referral arrangement itself expressly negated discrimination in requiring that employment be obtained "only on a seniority basis," irrespective of whether the "employee is or is not a member of the union," so that the parties could not discriminate without violating the



agreement. The fact that the referral agreement did not contain the provisions required by the Board in the *Mountain Pacific* case does not make it unlawful. Congress not being concerned with the substantive terms of collective agreements. Slater, being a member of the Union in good standing, his discharge, far from being discriminatory, was rather for his failure to comply with the terms of a valid agreement, and it is not the purpose of the Act to furnish statutory protection to contract breachers. R. 71.

The judgment of the court was entered on February 18, 1960 and appears at R. 73, its decree at R. 74.

### REASONS FOR GRANTING THE WRIT

#### I.

The decision of the majority below is in direct conflict with two decisions of the United States Court of Appeals for the 9th Circuit—*NLRB v. Associated General Contractors*, 270 Fed 2d 425, August 1959, and *Morrison-Knudsen Co. v. NLRB* Feb. 19, 1960.—F 2d — ; 45 LRRM 2907. In the first case the court reviewed the decision of the Board in *Mountain Pacific Chapter of the Associated General Contractors*, supra, in which the Board had first announced its doctrine of per se invalidity of hiring hall or referral arrangements where they did not contain the three provisions required by the Board, and which served for the basis of the Board's decision in the instant case, and the court held that the Board erred in its determination that a union operated hiring arrangement was invalid on its face, and further held that the Board was without power to require the incorporation into the hiring agreement of the three provisions in question. The Ninth Circuit stated that "the hiring hall is legal and has always been held so," and that any assumption of discrimination thereunder cannot be "a presumption of law arising from the naked provisions of the hiring hall contract alone." \* \* \* "An agreement that the hiring of employees be done through particular union

officers does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.' \* \* \* "It is apparent then that a contract which contains discriminatory provisions is illegal per se. It is also patent that a contract which is fair on its face is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action." In respect to the Board's requirement of contractual guarantees of nondiscrimination the court stated: "Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent."

The Ninth Circuit remanded the case to the Board with the observation that failure to include the Board's required clauses in a hiring or referral agreement might constitute evidence of an unlawful discriminatory intent, but the burden is upon the Board to prove discrimination as a fact.

In the Morrison-Knudsen case, supra, the court sharply reminded the Board that hiring or referral arrangements could not be considered per se violations of the Act or unlawful on their face.

The decision below is likewise in conflict with holdings of the 1st, 3rd, 6th, and 8th Circuits and a prior holding of the 9th Circuit, all of which united in expressing agreement with the 1950 observations of Senator Taft (S. Rep. No. 1827, 81st Cong., 2d Sess., 14) that:

The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. \* \* \* Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop \* \* \*

These holdings are *NLRB v. International Association of Heat and Frost Insulators*, 261 F. 2d 347, 350 (C.A. 1); *NLRB v. Philadelphia Iron Works, Inc.*, 211 F. 2d 937, 943 (C.A. 3); *Eichleay Corp v. NLRB*, 206 F. 2d 799, 803 (C.A.

3); *Del E. Webb Construction Co. v. NLRB*, 196 F. 2d 841, 845 (C.A. 8); *NLRB v. F. H. McGraw and Co.*, 206 F. 2d 635, 641 (C.A. 6); *NLRB v. Swinerton & Walberg Co.*, 202 F. 2d 511, 514, cert. denied, 346 U.S. 814 (C.A. 9).

The most recent pronouncement of the above is that of the 1st Circuit in *International Association of Heat and Frost Insulators*, 261 F. 2d 347, 350. There the Court stated:

It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system the employer calls upon the union to supply him with the necessary workers. However, if this system operates so as to discriminate against non-union workers and makes possible only the employment of union members, it is an unfair labor practice.

Since there is direct conflict between the decisions of the court below and that of the 9th Circuit in *Mountain Pacific* and *Morrison-Knudsen* on the precise issue for which review is here sought, and since there is further conflict between the decision of the court below and the upholding of the legality of an arrangement for hiring or referral of employees through a union source, and the holding that there must be a factual showing of discriminatory practices thereunder before such arrangements can be called unlawful as made by the 1st, 3rd, 6th, 8th and 9th circuits, it is respectfully urged that this Court accept review for the purpose of resolving such conflict.

## II.

Further ground for review is found in the fact that the present case involves an important question of the application and administration of the National Labor Relations Act as amended which has not been but should be settled by this court, and also a possible conflict with prior decisions of this Court.

## A.

The dispatching service maintained by Local 357 is an example of what is commonly known as the union hiring hall. Hiring halls predominate in such important industries as maritime, stevedoring, and the building and construction trades; where employment is characteristically fluid and sporadic and the recruitment of a labor force by a particular employment is tailored to the require of a particular job. The confinement of the dispatching service in this case to the hire of *casual* employees identifies the element of the employment relationship which is ordinarily the reason for the operation of a hiring hall. It is designed to bring the worker and the job together by funneling both to a central point from which employment can be sought and obtained, regularized and shared, on an evenhanded basis. The union hiring hall is thus addressed to and solves a real economic need. Its use and the freedom of unions and employers to contract concerning it has been seriously curtailed by the decision of the Board in this case upheld by the court below, and it is important that a definitive determination of the scope of the Board's power to draw inferences in the use of such hiring or referral arrangements or to require the insertion of so-called protective clauses be made by this court.

We have seen that all circuits where the issue has been reviewed except that below have held that it is legal to establish by contract that a union shall refer employees for work so long as referral is in fact made upon a non-discriminatory basis. The referral agreement in the instant case is not and can in no way be declared invalid on its face; it can be performed according to its terms without effecting discrimination. Indeed, to follow its precise terms would ensure non-discriminatory hiring, and discriminatory hiring could result only if the terms of the agreement were breached. Seniority alone governs dispatch and is determined by industry service. And seniority commences on

three months industry service "irrespective of whether such employee is or is not a member of the Union." Accordingly, not only does the agreement affirmatively establish that seniority is the controlling standard, but it also expressly negatives union membership or the lack of it as a factor in its determination.

The crux of the unfair labor practice prohibited by Section 8(a)(3) and (b)(2) is encouragement or discouragement of union membership by discrimination in employment. The operation of the dispatching service in accordance with the agreement entails no discrimination in employment. The dispatching service applies to all seeking casual employment, is open to all, and is open to all on the same terms. Nor is denial of casual employment to Slater except on proper referral discriminatory. This simply requires Slater to perform his contractual obligation, the same as all other casual employees, to seek casual employment solely through the service. To require adherence to a collective bargaining agreement by the employees it covers is not discrimination in employment.

In the absence of discrimination in employment, it is irrelevant for the Board to assert that the operation of the dispatching service inherently encourages union membership. All benefits obtained by unions encourage membership, but only that encouragement which flows from discrimination in employment is prohibited. There was in this case no encouragement of union membership, purposeful or presumed, in any sense referable to either the employee's status as a union member or his performance of the obligations of union membership.

Nor was there any violation of Section 8(a)(1) or (b)(1)(A) of the Act. These safeguard employees from abridgment of their "exercise of the rights guaranteed in Section 7," and the latter confers on employees the right to "refrain from" union or concerted activity. The only activity in this case in which the employees were required to

engage, and from which Slater sought to "refrain," was to seek casual employment only through the dispatching service if they chose to seek it at all. This is an obligation imposed by contract. Section 7 confers no protected right upon an employee to refrain from complying with an agreement.

The Board's invalidation of the dispatching service rests exclusively on its presumption that the union will operate it discriminatorily. To indulge this presumption of illegal conduct is in fundamental conflict with the civilized premise that the "law will never presume that parties intend to violate its precepts. . . ." *Owings v. Hull*, 9 Pet. 607, 628. An illegal "purpose is not to be presumed. The presumption is the other way. To be established it must be proved." *Mitchell v. United States*, 21 Wall. 350, 353. And in this case the proven facts do not permit but negative a conclusion that the dispatching service was actually discriminatorily operated or that the agreement contemplated any discrimination.

#### B.

The Board has created a presumption that a union will operate a referral system of employment discriminatorily and it has further held that there is no means of overcoming this presumption short of acquiescence in incorporating into the agreement the three requirements the Board decrees. But the Board is without power to require insertion of substantive terms into a collective bargaining agreement as its price for the valid establishment of a referral system. *NLRB v. American National Insurance Company*, 343 U.S. 395 at 404 and 409, and *Local 24 Teamsters Union v. Oliver*, 358 U.S. 283 at 295. "The Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." (*Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 13 at 108). And the three requirements formulated by the



Board are in themselves objectionable: To grant the employer the right to reject any applicant referred by the union takes from the union the right to seek protection against rejection except for good cause; the requirement that the agreement explicitly provide that selection of applicants shall be on a non-discriminatory basis takes from the contracting parties the right to determine whether they wish to add a contractual prohibition of unfair labor practices to the statutory obligation which already exists as a matter of law; and the requirement for posting of the hiring or referral agreement is one which can only be predicated on a prior finding of the commission of an unfair labor practice. See *Art Metals Construction Company v. NLRB*, 110 F. 2d 148 at 147 (C.A. 2). The Board thus begins with a presumption of illegality, which it has no power to indulge, and proceeds to the requirement that certain provisions be inserted into the agreement in order to overcome the presumption, which it has no power to impose.

## C.

Slater was a member of Local 357 in good standing. There was no showing that he was in default in the performance of any obligation of union membership. Accordingly, neither lack of union membership or default in the discharge of an obligation of union membership could be, and there is no claim, showing, or finding that these were, the foundation for any action against Slater. On the contrary, the express finding is that the Company discontinued Slater's employment as a casual employee solely because he had obtained casual employment with it without recourse to the dispatching service, in compliance with Local 357's request not to employ him in that capacity except on proper referral. (R. 49-55). To have permitted Slater to retain his casual employment with the Company, secured by him in violation of the agreement, would have been to discriminate in his favor and against all the other employees who were fulfilling their contractual obliga-



tion to work through the dispatching service. Action by an employer and a union to secure an employee's adherence to the terms of an agreement is not and cannot be discrimination in employment. *N.L.R.B. v. Furriers Joint Council*, 224 F. 2d 78 (C.A. 2), affirming the views of the dissenting Board member and the examiner, 108 N.L.R.B. 1506, 1511, 1520-1522; *N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, 80.

As stated by Judge Edgerton in his dissent below, "To interpret the Act as 'furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts' would not be 'consistent with the underlying purpose of the Act to promote . . . collective bargaining agreements . . .'" *NLRB v. Furriers Joint Council*, 224 F. 2d 78, 80 (2d Cir.).

The Board's asseveration of encouragement of union membership also glosses over the fact that it is the employer's "purpose" to encourage, which is "controlling." Specific proof of intent is unnecessary only in the sense that its existence is inferable from the character and consequence of the conduct. The only relevant conduct disclosed in this case is the operation of a dispatching service not discriminatory either in its general or specific application. From these bare facts nothing is inferable as to either the Company's or Local 357's purpose except that they sought to regularize casual employment and to require an employee who circumvented his contractual obligation to adhere to it. Especially is this so when it is remembered that the Company and Local 357 were operating under a master agreement negotiated by fifteen local unions and an association representing about one thousand employers. Surely an industry-wide purpose to engage in prohibited encouragement of union membership is not inferable.

### CONCLUSION

From what has been said above it is clear that not only is an important question of federal law presented in this

petition for review, but that the court below has decided a federal question of substance erroneously and in conflict with applicable decisions of this Court. The validity of many thousands of union hiring or referral arrangements in present operation throughout the United States has been brought into question by the decision of the Board in this case, and the upholding of that decision by the court below. Moreover, the decision of the court below conflicts directly with the decisions of the other circuit courts of appeal. It would appear that review by this Court is warranted and necessary.

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

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## APPENDIX A

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF  
AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Petition for Review of Order of the National Labor  
Relations Board and Cross Application for Enforcement.

Decided February 18, 1960

*Mr. Bernard Danan*, with whom *Messrs. Herbert S. Thatcher* and *David Previant* were on the brief, for petitioner.

*Miss Rosanna A. Blake*, Attorney, National Labor Relations Board, with whom *Messrs. Jerome D. Penton*, General Counsel, National Labor Relations Board at the time the brief was filed, *Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Betty Jones Southard*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before EDGERTON, WILBUR K. MILLER and DANAHY,  
Circuit Judges.

PER CURIAM: Local 357 of the Teamsters union asks us to review and set aside, and the National Labor Relations Board asks us to enforce, an order of the latter which held an exclusive hiring hall agreement constitutes discrimination which encourages union membership within the meaning of Section 8(a)(3) and (1) and 8(b)(2) and (1)(A) of the National Labor Relations Act as amended, 61 STAT. 136, 65 STAT. 601, 29 U. S. C. § 158. The order directed the respondent employer, Los Angeles-Seattle Motor Express, and the union to cease and desist from performing, maintaining or otherwise giving effect to the condemned hiring hall agreement and to take certain affirmative action which the Board found would effectuate the purposes of the Act.

Among the affirmative acts which the order required of the union and employer jointly was to make whole one Lester H. Slater for any loss he may have suffered from the discrimination which the Board held had been practiced against him under the hiring hall agreement; and to reimburse all casual employees for the initiation fees and dues which, the Board said, had been "exact[ed] from them as the price of their employment."

We think the Board's order is correct except that it goes too far in directing reimbursement of the dues and fees paid to the union by all casual employees. *National Labor Relations Board v. American Dredging Co.*, — F. (2d) — (3rd Cir. Jan. 8, 1960).<sup>1</sup> The order should be modified to confine the reimbursement feature to Slater alone. As so modified, the Board's order will be enforced.

*It is so ordered.*

<sup>1</sup> We have considered the opinion of the Seventh Circuit in *National Labor Relations Board v. Local 60, et al.*, — F. (2d) — (Jan. 22, 1960), but are constrained to the view that the Third Circuit opinion more aptly applies to the problem presented on the record before us.

EDGERTON, *Circuit Judge, dissenting*: The Board rightly says "The basic issue in this case is the propriety of the Board's finding that the Union's exclusive hiring hall agreement violated the Act on its face." I think this finding is wrong and the order should be set aside.

The court appears to hold that an exclusive hiring-hall agreement is necessarily unlawful. My impression is that "The hiring hall is legal and has always been held so." *N.L.R.B. v. Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 429 (9th Cir. 1959). An "agreement that hiring of employees be done only through a particular union's offices does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.' 95 N.L.R.B. at 435." *N.L.R.B. v. Swinerton*, 202 F. 2d 511, 514 (9th Cir.), *cert. denied* 346 U.S. 814. "The factor in a hiring-hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Co. v. N.L.R.B.*, 8 Cir., 1952, 196 F. 2d 841, 845." *Eichleay Corp. v. N.L.R.B.*, 206 F. 2d 799, 803 (3d Cir. 1953). The present hiring-hall arrangement expressly negatives any such agreement, by requiring employment to be "only on a seniority basis" irrespective of whether the "employee is or is not a member of the Union." Without violating this agreement, the employer cannot discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership" in the union, in violation of §8(a)(3) of the Labor Management Relations Act,<sup>1</sup> and the union cannot "cause or attempt to cause an employer to discriminate against an employee in violation of" that section.<sup>2</sup>

<sup>1</sup> 61 Stat. 140 (1947) as amended, 29 U.S.C. § 158(a)(3) (1958).

<sup>2</sup> § 158(b)(2).

The agreement does not contain the language the Board required in the *Mountain Pacific* case, 119 N.L.R.B. 883, 897, but this does not make it unlawful. *N.L.R.B. v. Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 431 (9th Cir.). "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed." *Local 24 Internat'l Brotherhood of Teamsters etc. v. Oliver*, 358 U.S. 283, 295. The possibility that the arrangement may at some future time lead to unlawful discrimination does not invalidate it. *Shuttlesworth v. Board of Education*, 358 U.S. 101, affirming 162 F. Supp. 372, 384.

The court upholds the Board's finding that the discharge of employee Slater resulted from the hiring provisions of the contract and was discriminatory. Slater had not obtained or sought employment through the hiring hall. I think his discharge for this reason did not discriminate against him or violate the Act. To interpret the Act as "furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts" would not be "consistent with the underlying purpose of the Act to promote . . . collective bargaining agreements . . ." *N.L.R.B. v. Furriers Joint Council*, 224 F. 2d 78, 80 (2d Cir.). Slater was a member of the Union in good standing. I cannot see that his discharge for failing to comply with an agreement between the Union and the employer encourages union membership.

## In the Supreme Court of the United States

OCTOBER TERM, 1959

LOCAL 357, INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR  
RELATIONS BOARD

J. LEE RANKIN,  
*Solicitor General,*  
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*Washington 25, D.C.*

STUART ROTHMAN,  
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*Acting Assistant General Counsel,*  
*National Labor Relations Board,*  
*Washington 25, D.C.*



# **In the Supreme Court of the United States**

OCTOBER TERM, 1959

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No. 825

LOCAL 357, INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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## **MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

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The question presented is whether the Board properly concluded that an agreement between a union and an employer which delegated to the union exclusive control over clearing applicants for employment violates Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, absent the incorporation of adequate safeguards which assure the applicants that clearance will be given on a non-discriminatory basis. In short, this case presents the question of the validity of the Board's so-called *Mountain Pacific* standards for hiring halls, first enunciated in the *Mountain Pacific* case (119 NLRB 883) and applied here.

The court below, with one judge dissenting, sustained the Board's unfair labor practice findings.

Its decision is in accord with that of the First Circuit in *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, decided March 30, 1960. However, the Board's position has been rejected by the Ninth Circuit in *National Labor Relations Board v. Mountain Pacific Chapter of Associated General Contractors*, 270 F. 2d 425, and *National Labor Relations Board v. Hod Carriers*, decided February 5, 1960. And see *National Labor Relations Board v. E & B Brewing Co.*, decided April 5, 1960, 45 LRRM 3073 (C.A. 6).

In view of the conflict of decisions and the importance of the question, the Board is filing a petition for certiorari in the *Hod Carriers* case. Accordingly, the Government does not oppose the grant of the present petition.<sup>1</sup>

Respectfully submitted,

J. LEE RANKIN,  
Solicitor General.

STUART ROTHMAN,  
General Counsel.

DOMINICK L. MANOLI,  
Associate General Counsel,

NORTON J. COME,  
Acting Assistant General Counsel,  
National Labor Relations Board.

April, 1960.

<sup>1</sup> The Board is considering whether to file a cross-petition in the case, with respect to the court's denial of the reimbursement remedy (Pet. 18).

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JAMES R. BROWNING, C.

No. **829 85**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1959**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF  
AMERICA**

---

**CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT**

---

**STUART ROTHMAN,**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1959

\_\_\_\_\_  
No. \_\_\_\_\_

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA

\_\_\_\_\_  
*CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT*

\_\_\_\_\_  
The National Labor Relations Board prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 18, 1960, which denies enforcement of the reimbursement provisions of the Board's order.

**OPINIONS BELOW**

The opinions of the court of appeals (Appendix, pp. 9-12, *infra*) are not yet officially reported. The findings of fact, conclusions of law, and order of the Board (R. 37-44)<sup>1</sup> are reported at 121 NLRB 1629.

<sup>1</sup> "R" references are to the portions of the record printed in the Joint Appendix in the court below.

## JURISDICTION

The judgment of the court of appeals (Appendix, pp. 13-14, *infra*) was entered on February 18, 1960, and its decree (Appendix, pp. 14-18, *infra*) was entered on March 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Board, as a remedy for a hiring arrangement which has been found to coerce employees and encourage union membership in violation of Sections 8(b) (1)(A) and (2) of the National Labor Relations Act, may require that the employees be reimbursed for all dues and initiation fees which they paid to the union under the illegal arrangement.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*, are as follows:

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 \* \* \*

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;



SEC. 10. (c) \* \* \* If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to ~~cease~~ and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: \* \* \*

#### STATEMENT

##### A. THE BOARD'S FINDINGS

In 1955, respondent Union executed a 3-year collective bargaining contract with the California Trucking Associations, which represented a number of motor truck operators including Los Angeles-Seattle Motor Express, the employer involved in this case (R. 8-9). The provisions of the contract relating to hiring of casual or temporary employees were as follows (R. 55-56, 62-63):

Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union.

Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

Pursuant to these terms, the Union maintained a hiring hall for the dispatch of casual employees to Los Angeles-Seattle, as well as to other trucking firms who were parties to the contract.

Lester Slater was a member of the Union, and, for two years, had secured casual employment through the hiring hall (R. 55; 14-17). On August 27, 1955, Slater managed to obtain employment with Los Angeles-Seattle directly, without being dispatched by the Union (R. 39; 29, 67). Upon learning of this fact, the Union complained to the Company that it was violating the contract by employing Slater absent a referral from the Union, and demanded that his employment be terminated. On November 10, the Company complied with the Union's demands and told Slater not to return to work until he "had the matter cleared up." Slater has not worked for the Company since (R. 39; 26-27, 29-30).

## B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the hiring hall provisions of the contract obligated the Company to hire casual employees only through the Union. It further concluded that such an exclusive hiring arrangement unlawfully coerced and encouraged employees to become and remain union members, in violation of Sections 8(a) (3) and (1) and 8(b) (2) and (1)(A) of the Act, in that it did not explicitly contain the safeguards specified in the *Mountain Pacific* decision.<sup>2</sup> In addition, the Board, finding that Slater's loss of employment was the result of the parties' implementation of the illegal hiring provision, concluded that his discharge was also violative of these Sections (R. 37-39).

The Board's order directs the Union and the employer to cease and desist from maintaining or giving effect to the unlawful hiring provisions of the contract and from in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (R. 41, 43). It also requires the Union to cease and desist from causing or attempting to cause unlawful discrimination in

<sup>2</sup>In *Mountain Pacific Chapter*, 119 NLRB 883, 897, the Board held that an exclusive hiring hall agreement which delegates control over hiring to the union is violative of the Act unless it explicitly provides that:

1. Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and in no way affected by union membership.

2. The employer retains the right to reject any job applicant referred by the union.

3. The parties shall post for the employees' inspection all provisions relating to the functioning of the hiring agreement, including the foregoing provisions.

employment (R. 43). Affirmatively, the Union is required to notify in writing both the employer and Slater that it has no objection to the latter's employment, and the employer is required to send a similar notice to Slater and the Union (R. 42, 43). Both are ordered to make Slater whole for losses in wages suffered by reason of the discrimination against him. In addition, the Board's order requires Los Angeles and the Union to refund to the casual employees of that employer the initiation fees and dues exacted from them under the illegal hiring arrangement (R. 40), and to post appropriate notices (R. 43-44).

#### C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, with one judge dissenting, sustained the Board's unfair labor practice findings, and granted enforcement of its order, except that portion requiring reimbursement of dues and fees paid to the Union by all casual employees. The order was modified to confine the reimbursement feature to Slater alone. (Appendix, pp. 9-12, 15-16, *infra*.)

#### REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' decision on the merits, sustaining the validity of the Board's *Mountain Pacific* standards for exclusive hiring arrangements, is before this Court on the Union's petition, No. 825, October Term, 1959. The Board has filed a memorandum not opposing that petition, and has filed its own petition to review the contrary decision of the Ninth Circuit in *National Labor Relations Board v. Hod Carriers*, on the same question, No. 887, this Term.

2. The Court of Appeals' decision on the reimbursement portion of the Board's order presents the question of whether the Board, as a remedy for hiring practices which unlawfully encourage union membership, may require that all monies paid by the employees to the union while subjected to those practices be repaid to them. This remedy, known as the *Brown-Olds* remedy, has been extensively used by the Board with respect such unfair labor practices. The rejection of this remedy by the court, below, although consistent with the decisions of the Third, Fifth, Second and Ninth Circuits,<sup>3</sup> is in conflict with the decision of the<sup>4</sup> Seventh Circuit in *National Labor Relations Board v. Local 60, United Brotherhood of Carpenters*, 273 F. 2d 699. The union has petitioned for certiorari in the latter case, No. 846, this Term, and, in view of the importance of the question and the conflict of decisions, the Board intends to file a memo-

It was first enunciated in a case by that name, *United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry, and J. N. Brown-E. F. Olds Plumbing and Heating Corp.*, 115 NLRB 594 (1956).

<sup>3</sup>Third Circuit: *National Labor Relations Board v. United States Steel Corp. and Local Union 542, Operating Engineers*, No. 13011, April 13, 1960; *National Labor Relations Board v. American Dredging Co.*, No. 12918, January 8, 1960; *National Labor Relations Board v. Lakeland Bus Lines*, No. 13016, April 14, 1960. Fifth Circuit: *National Labor Relations Board v. Local No. 85, Sheet Metal Workers*, 274 F. 2d 344; *National Labor Relations Board v. Millwrights' Local 2232*, No. 17777, April 11, 1960. Second Circuit: *Morrison-Knudsen Co. v. National Labor Relations Board*, No. 25613, March 2, 1960; *Building Material Teamsters, Local 282 v. National Labor Relations Board*, Nos. 25608 and 25614, March 2, 1960. Ninth Circuit: *Morrison-Knudsen Co. v. National Labor Relations Board*, Nos. 16383 and 16401, February 19, 1960.

random not opposing the petition. In order to resolve the conflict, it is appropriate that the Court review the decision herein at the same time.

#### CONCLUSION

For the reasons stated, this cross-petition for certiorari should be granted.

Respectfully submitted,

STUART ROTHMAN,  
*General Counsel,*

DOMINICK L. MANOLI,  
*Associate General Counsel,*

NORTON J. COME,  
*Assistant General Counsel,*  
*National Labor Relations Board.*

I authorize the filing of this cross-petition for a writ of certiorari.

J. LEE RASKIN,  
*Solicitor General.*

MAY 1960.

## APPENDIX

In the United States Court of Appeals for the District of Columbia Circuit

No. 14794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*Petition for Review of Order of the National Labor Relations Board and Cross-Appeal for Enforcement*

Decided February 18, 1960

*Mr. Bernard Dunau*, with whom *Messrs. Herbert S. Thatcher* and *David Previant* were on the brief, for petitioner.

*Miss Rosanna A. Blake*, Attorney, National Labor Relations Board, with whom *Messrs. Jerome D. Fenton*, General Counsel, National Labor Relations Board at the time the brief was filed, *Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Betty Jane Southard*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before EDGERTON, WILBUR K. MILLER and DANAHER,  
Circuit Judges.

*Per Curiam*: Local 357 of the Teamsters union asks us to review and set aside, and the National Labor



Relations Board asks us to enforce, an order of the latter which held an exclusive hiring hall agreement constitutes discrimination which encourages union membership within the meaning of Sections 8(a) (3) and (1) and 8(b) (2) and (1)(A) of the National Labor Relations Act as amended, 61 Stat. 136, 65 Stat. 601, 29 U.S.C. § 158. The order directed the respondent employer, Los Angeles-Seattle Motor Express, and the union to cease and desist from performing, maintaining or otherwise giving effect to the condemned hiring hall agreement and to take certain affirmative action which the Board found would effectuate the purposes of the Act.

Among the affirmative acts which the order required of the union and employer jointly was to make whole one Lester H. Slater for any loss he may have suffered from the discrimination which the Board held had been practiced against him under the hiring hall agreement; and to reimburse all casual employees for the initiation fees and dues which, the Board said, had been "exacte<sup>d</sup> from them as the price of their employment."

We think the Board's order is correct except that it goes too far in directing reimbursement of the dues and fees paid to the union by all casual employees. *National Labor Relations Board v. American Dredging Co.*, — F. (2d) — (3rd Cir. Jan. 8, 1960).<sup>1</sup> The order should be modified to confine the reimbursement feature to Slater alone. As so modified, the Board's order will be enforced.

*It is so ordered.*

<sup>1</sup> We have considered the opinion of the Seventh Circuit in *National Labor Relations Board v. Local 60, et al.* — F. (2d) — (Jan. 22, 1960), but are constrained to the view that the Third Circuit opinion more aptly applies to the problem presented on the record before us.

EDGERTON, *Circuit Judge, dissenting*: The Board rightly says "The basic issue in this case is the propriety of the Board's finding that the Union's exclusive hiring hall agreement violated the Act on its face." I think this finding is wrong and the order should be set aside.

The court appears to hold that an exclusive hiring-hall agreement is necessarily unlawful. My impression is that "The hiring hall is legal and has always been held so." *N.L.R.B. v. Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 429 (9th Cir. 1959). An "agreement that hiring of employees be done only through a particular union's offices does not violate the Act absent evidence that the union unlawfully discriminated in supplying the company with personnel." 95 N.L.R.B. at 435." *N.L.R.B. v. Swinerton*, 202 F. 2d 511, 514 (9th Cir.), *cert. denied* 346 U.S. 814. "The factor in a hiring-hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Co. v. N.L.R.B.*, 8 Cir., 1952, 196 F. 2d 841, 845." *Eichleay Corp. v. N.L.R.B.*, 206 F. 2d 799, 803 (3d Cir. 1953). The present hiring-hall arrangement expressly negatives any such agreement, by requiring employment to be "only on a seniority basis" irrespective of whether the "employee is or is not a member of the Union." Without violating this agreement, the employer cannot discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership" in the union, in violation of § 8(a)(3) of the Labor Management Relations Act,<sup>1</sup> and the union cannot "cause or attempt to cause an employer to

<sup>1</sup> 61 Stat., 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1958).

discriminate against an employee in violation of" that section.<sup>2</sup>

The agreement does not contain the language the Board required in the *Mountain Pacific* case, 119 N.L.R.B. 883, 897, but this does not make it unlawful. *N.L.R.B. v. Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 431 (9th Cir.). "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed." *Local 24, Internat'l Brotherhood of Teamsters etc. v. Oliver*, 358 U.S. 283, 295. The possibility that the arrangement may at some future time lead to unlawful discrimination does not invalidate it. *Shuttlesworth v. Board of Education*, 358 U.S. 101, affirming 162 F. Supp. 372, 384.

The court upholds the Board's finding that the discharge of employee Slater resulted from the hiring provisions of the contract and was discriminatory. Slater had not obtained or sought employment through the hiring hall. I think his discharge for this reason did not discriminate against him or violate the Act. To interpret the Act as "furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts" would not be "consistent with the underlying purpose of the Act to promote \* \* \* collective bargaining agreements \* \* \*." *N.L.R.B. v. Furriers Joint Council*, 224 F. 2d 78, 80 (2d Cir.). Slater was a member of the Union in good standing. I cannot see that his discharge for failing to comply with an agreement between the Union and the employer encourages union membership.

<sup>2</sup> § 158(b) (2).

[Copy]

United States Court of Appeals  
for the  
District of Columbia Circuit  
Filed Feb. 18, 1960  
/s/ JOSEPH W. STEWART,  
Clerk.

In the United States Court of Appeals for the  
District of Columbia Circuit

No. 14794

September Term, 1959

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*On Petition for Review of Order of the National Labor Rela-  
tions Board and Cross-Petition for Enforcement*

Before EDGERTON, WILBUR K. MILLER, and DANAHER,  
Circuit Judges

JUDGMENT

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case be modified as indicated in the opinion of this court and, as so modified, will be enforced.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and

file a proposed enforcement decree consistent with the opinion and judgment of this court.

*Per Curiam.*

Dated: February 18, 1960.

Separate dissenting opinion by *Circuit Judge*  
EDGERTON.

[Copy]

United States Court of Appeals  
for the  
District of Columbia Circuit  
Filed Mar. 10, 1960  
/s/ JOSEPH W. STEWART,  
Clerk.

In the United States Court of Appeals for the  
District of Columbia Circuit

No. 14794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF  
AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT  
DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

Before EDGERTON, WILBUR K. MILLER AND DANAHER,  
*Circuit Judges*

This cause came on to be heard upon the petition of Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to review an order of the National Labor Relations Board dated October 31, 1958, and upon the Board's cross-application to enforce said order. The Court heard argument of respective counsel on September 16, 1959 and has considered the briefs

and transcript of record filed in this cause. On February 18, 1960, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order as modified and granting in part and denying in part the petition to review. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED BY THE COURT, that the petitioning Union Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America its officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to provisions of any agreement with Los Angeles-Seattle Motor Express, Incorporated (hereinafter called the Company), or any other employer within the meaning of the National Labor Relations Act (hereinafter called the Act), which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment with any employer, upon referral or clearance by the Petitioner Union, except as authorized by the proviso to Section 8(a)(3) of the Act;

(2) Causing or attempting to cause the Company, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8(a)(3) of the Act;

(3) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8(a)(3) of the Act;

(b) Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Jointly and severally with the Company, make whole Lester H. Slater for any loss of pay he may



have suffered by reason of the discrimination against him, as provided in the Section of the National Labor Relations Board's Decision and Order, dated October 31, 1958, entitled "The Remedy";

(2) Jointly and severally with the Company, reimburse Lester H. Slater for monies illegally exacted from him in the manner and to the extent set forth in the aforesaid Decision and Order.

(3) Notify Lester H. Slater and the Company, in writing, that it has no objection to Slater's employment;

(4) Post at its offices, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Twenty-first Region (Los Angeles, California), shall, after being duly signed by Petitioner's representative, be posted immediately upon receipt thereof and maintained by the Petitioner for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Petitioner to insure that said notice shall not be altered, defaced, or covered by any other material;

(5) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this decree, what steps it has taken to comply herewith.

---

*Judge, United States Court of Appeals  
for the District of Columbia Circuit.*

---

*Judge, United States Court of Appeals  
for the District of Columbia Circuit.*



*Judge, United States Court of Appeals  
for the District of Columbia Circuit.*

Circuit Judge Edgerton dissents.

Dated: March 10, 1960

APPENDIX A

NOTICE

TO ALL EMPLOYEES OF AND APPLICANTS FOR EMPLOY-  
MENT WITH LOS ANGELES-SEATTLE MOTOR EXPRESS,  
INCORPORATED

PUISUANT TO

a Decree of the United States Court of Appeals en-  
forcing, as modified, an Order of the National Labor  
Relations Board, and in order to effectuate the poli-  
cies of the National Labor Relations Act, as amended,  
we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise  
give effect to the provisions of any agreement  
with Los Angeles-Seattle Motor Express Incorpo-  
rated, or with any other employer, which un-  
lawfully conditions the hire of applicants for  
employment, or the retention of employees in  
employment with any employer, upon referral or  
clearance by any labor organization, except as  
authorized by Section 8(a)(3) of the Act.

WE WILL NOT cause or attempt to cause the  
above-named employer, or any other employer, to  
discriminate against employees or applicants for  
employment in violation of Section 8(a)(3) of  
the Act.

WE WILL NOT in any like or related manner  
restrain or coerce employees in the exercise of the

rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8(a)(3) of the Act.

WE WILL reimburse Lester H. Slater for the initiation fees and dues he was illegally required to pay to our union as a result of the unlawful hiring provisions in our contract with the aforementioned company.

WE WILL make whole Lester H. Slater for any loss of pay suffered as a result of the discrimination against him.

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA, LOCAL 357  
(Labor Organization)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

FILE COPY

Office Supreme Court, U.S.

FILED

MAY 27 1950

JAMES R. BROWNING, JR.

No. 75

# In the Supreme Court of the United States

OCTOBER TERM, 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

**REPLY MEMORANDUM FOR LOCAL 357, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS OF AMERICA**

HERBERT S. TATCHER  
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Los Angeles, California

---

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 929

---

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

---

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

---

## REPLY MEMORANDUM FOR LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

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The question presented in this Cross-Petition is substantially as set forth by Petitioner in such Cross-Petition. As there indicated, the decision of the Court of Appeals for the District of Columbia respecting the invalidity of the so-called Brown-Olds remedy is consistent with decisions of the Second, Third, Fifth and Ninth Circuits but is in conflict with decisions of the Seventh Circuit. Because of such conflict, which only this Court can resolve, and because of the importance of the question involved in the administration of the National Labor Relations Act, as amended, the Respondent Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

does not oppose the grant of the instant Petition, although it believes the decision of the Court of Appeals below respecting the invalidity of the Brown-Olds remedy to be a correct one,

Respectfully submitted,

HERBERT S. HATCHER  
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Washington, D. C.

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511 Warner Building  
Milwaukee, Wisconsin

CHARLES HACKLER  
1616 West Ninth Street  
Los Angeles, California  
*Attorneys for Respondent.*

In the Supreme Court of the United States.

OCTOBER TERM, 1960

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.  
PETITIONER,

THE NATIONAL LABOR RELATIONS BOARD

THE NATIONAL LABOR RELATIONS BOARD

PETITIONER,

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF LOCAL 357, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND  
HELPERS OF AMERICA**

HERBERT S. THATCHER  
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511 Warner Building  
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Los Angeles, California

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 64 AND 85.

64

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.  
PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD.

85

THE NATIONAL LABOR RELATIONS BOARD

PETITIONER,

v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF LOCAL 357, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND  
HELPERS OF AMERICA**

## OPINIONS BELOW

The opinion of the court of appeals (R. 63) is reported in 275 F. 2nd 646. The findings of fact, conclusions of law, and order of the Board (R. 37-47) are reported at 121 NLRB No. 205.

## JURISDICTION

The judgment of the court of appeals was entered on February 18, 1960, and appears at R. 72, its decree at R. 73. Certiorari was granted on April 20, 1959 (R. 77). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 447, 29 U.S.C. 160(e).

## QUESTIONS PRESENTED

1. Whether a union and an employer may by contract validly provide that casual employment shall be obtained by a worker solely upon referral from a nondiscriminatory dispatching service operated by the union if the contract does not explicitly incorporate the following three requirements formulated by the National Labor Relations Board: (1) selection of applicants for referral to jobs shall be on a nondiscriminatory basis, (2) the employer retains the right to reject any job applicant referred by the union, and (3) the parties to the agreement post notices of all the provisions relating to the functioning of the hiring arrangement.

2. Whether the operation of the dispatching service pursuant to a contract that does not contain the foregoing three requirements is a valid basis for an order by the National Labor Relations Board requiring the employer and the union jointly and severally to reimburse the casual employees for the union dues and initiation fees paid to the union by the employees for the period beginning six months preceding the filing and service of the unfair labor practice charge.

## STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Section 151, et seq.), are Sections 7, 8(a)(1) and (3), 8(b)(1)(A), 8(b)(2):

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organiza-

tions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

(2) to cause or attempt to cause an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

### STATEMENT

#### 1. The Facts

There is no conflict respecting the applicable facts; this case presents primarily questions of law: the validity of the hiring or referral agreement on its face, and, if invalid, the validity of the Board order requiring reimbursement of dues and initiation fees to employees employed thereunder. The case arose in the following posture:

California Trucking Associations, Inc., an association of



motor truck operators, represents its employer members in collective bargaining with the unions who act for their employees (R. 55). About May 1, 1955, the Association entered into a collective bargaining contract, known as the Master Dry Freight Agreement, with the International Brotherhood of Teamsters and fifteen of its affiliated local unions, of which petitioned Local 357 is one (R. 55; 62-66). The Association executed this master agreement on behalf of about one thousand trucking firms of which Los Angeles — Seattle Motor Express, Inc., herein called the Company, is one (R. 55, 60). The agreement was for a three year term commencing May 1, 1955 (R. 55).

The agreement provided that, with respect to those employers who operated within the territorial jurisdiction of a local union which maintained a dispatching service, the employers were to hire *casual* employees solely through the dispatching service unless such workers were unavailable from that source (R. 37, 49, 56; 62-63). The agreement stated this requirement in the following terms (R. 62-63):

Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union.

Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified

that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

Lester H. Slater was a member in good standing of ~~union~~ Local 357 (R. 49). For some two years he had secured casual employment through the dispatching service maintained by Local 357 (R. 55). However, on August 27, 1955, he obtained employment with the Company as a casual employee without clearance through the dispatching service (R. 49, 54-55). On November 10, 1955, upon learning that Slater had secured casual employment without referral from the dispatching service, an officer of Local 357 responsible for maintaining observance of the agreement requested the Company to cease employing Slater as a casual employee except on proper referral through the dispatching service (R. 39, 49-50, 55). The Company honored the request in accordance with its agreement (*ibid.*). The Company had originally hired Slater as a casual employee without referral from the dispatching service based on a misapprehension that Local 357 had authorized Slater to seek casual employment by means other than recourse to the dispatching service (R. 54-55). Local 357 informed the Company and Slater that it had no objection to the Company's direct hire of Slater as a *regular* employee if it so desired, the requirement of referral through the dispatching service applying only to casual employment (R. 52).

In practice, the dispatching service was not operated during the year of its existence so as to discriminate between union and non-union job applicants; at the later hearing before the Board there was no claim or evidence that the Local 357 applied the dispatching service in a discriminatory fashion, the Board resting its decision on inferences drawn from the bare existence of the referral agreement (R. 56-57, 58).

### *B. The Proceedings Before the Board*

Upon charges filed by Slater against the union and the Company, a hearing was held before a trial examiner. He recommended dismissal of the complaint on the ground that the referral agreement was valid and that there was no evidence of any unlawful discriminatory application of the agreement, either as to Slater in particular, or as to other job applicants generally (R. 47-61).

On appeal by the General Counsel to the Board, the Board reversed on the sole basis of the invalidity of the referral agreement on its face, and the Company's and the union's insistence that Slater be denied employment for failure to comply with its terms. The Board found that the agreement was invalid on its face in that it obligated the Company to hire casual employees exclusively through the dispatching service maintained by Local 357 (R. 37-38). It stated that (*ibid.*):

Such an exclusive hiring agreement between an employer and a union, the Board has recently held, constitutes an inherent and unlawful encouragement of union membership *unless* the agreement explicitly provides that: (1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements; (2) The employer retains the right to reject any job applicant referred by the union; and (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards deemed by the Board to be essential to the legality of an exclusive hiring agreement. None of these safeguards essential to the legality of an exclusive hiring arrangement is contained in the contract to which Respondents [Local 357 and the Company] are parties. Under all the circumstances, we conclude that the Respondent Com-

pany has violated Section 8(a)(3) and (1) of the Act, and the Respondent Union has violated Section 8(b)(2) and (1)(A) of the Act, by giving effect to the hiring provisions of their contract.

The Board rested this conclusion exclusively upon its recent decision in *Mountain-Pacific Chapter of the Associated General Contractors*, 119 NLRB 883 (R. 38 and n. 1). It stated in that case that: the "vice" of a system of employment based on dispatch from a hiring hall operated by a union "lies in the fact of unfettered union control over all hiring . . ." (*id.* at 896); in exercising this power "it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty . . ." (*ibid.*); employees will therefore strive "to ingratiate themselves with the Union" (*id.* at 895), and hence "the inference of encouragement of union membership is inescapable" (*id.* at 896); accordingly, "the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be nondiscriminatory on its face, only if the agreement explicitly provided" for the three requirements previously quoted (*id.* at 897).

The Board made no finding that Slater or any other job applicant had in any way been singled out for discriminatory treatment because of any lack of standing with the union, and it did not disagree with the trial examiner's findings that:

... there is no evidence that he [Slater] was singled out and subjected to discriminatory treatment, and I

<sup>1</sup> In *Mountain Pacific* (199 NLRB at 894) the Board, as here, held the referenced agreement unlawful on its face and without regard to any other evidence of discrimination, the Board stating as follows: "The basic question herein is whether the written contract, apart from all other evidence in the case, is itself unlawful because of the exclusive hiring-hall provisions it contains. We hold the hiring-hall provisions of this contract to be unlawful. For purposes of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegation of discriminatory practices in hiring."

can hardly conceive of any reason why he should have been: (R. 52) . . . no contention is made, and no evidence proffered by the General Counsel to show that the Union has in any way discriminated against non-union members in its application of the seniority provisions of the contract. (R. 56-57).

Member Murdock dissented in *Mountain Pacific* (*id.* at 887-891). He explained that: "For more than 7 years it has been well-established Board law, judicially approved in every circuit court of appeals in which the issue was raised, that an exclusive nondiscriminatory hiring hall is not *per se* unlawful" (*id.* at 887); the true rule is "that where the General Counsel had *proved* that an ostensible nondiscriminatory hiring hall was, *in fact, operated* as a closed shop or in an otherwise discriminatory manner, the *practice* was unlawful" (*id.* at 890-891); "in the instant case", on the contrary, "the majority *presumes* that the Union will administer an otherwise lawful contract in an unlawful manner. This presumption is made *conclusive* unless the contract includes objective criteria which will explain and justify the exclusive aspect of hiring hall referrals" (*id.* at 888-889); this "amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation" (*id.* at 890).

The Board further concluded, based on its foundation finding that the requirement of referral for casual employment through the dispatching service was unlawful *per se*, that the Company's denial of casual employment to Slater, based on Local 357's request, except on proper referral, constituted a violation of Section 8(a)(3) and (1) of the Act by the Company and a violation of Section 8(b)(2) and (1)(A) by Local 357 (R. 39).

The Board entered an order against the Company and Local 357 requiring *inter alia* that (1) they cease giving effect to any agreement "which unlawfully conditions the hire of applicants for employment, or the retention of em-

employees, upon referral or clearance" by a labor organization; (2) they jointly and severally reimburse Slater for any loss sustained by him by reason of the referral requirement; and (3) they jointly and severally reimburse all casual employees for any initiation fees and dues paid by them to Local 357 beginning with the period six months preceding the filing and service of the charge (R. 39-44).<sup>2</sup> In explanation of the requirement that the initiation fees and dues be reimbursed the Board stated that (R. 40):

By the illegal hiring provisions of their contract, the Respondents have unlawfully encouraged employees to join the Respondent Union in order to obtain casual employment, thereby inevitably coercing those employees to pay union initiation fees and dues. It would not effectuate the policies of the Act to permit the retention of the payments of these union initiation fees and dues which have been unlawfully exacted from casual employees. As part of the remedy, therefore, we shall order the respondent jointly and severally to refund to the casual employees involved the initiation fees and dues paid by them as a price for their employment. This remedy of reimbursement is, we believe, appropriate and necessary to expunge the coercive effect of Respondents' unfair labor practices.

The Board directed such reimbursement in spite of the fact that there was no proof or even claim that any casual employee had in fact or in practice been coerced into joining the union and paying its fees pursuant to the referral system, or that he had involuntarily made his union contributions.

### *C. Proceeding Before the Court of Appeals*

Local 357 thereafter petitioned the court below for review of the Board's Decision and Order; and on February 18, 1960, a majority of that court (Judges Wilbur K.

<sup>2</sup>The requirement to reimburse Slater for loss of earnings and the casual employees for initiation fees and dues is tolled for the period that the intermediate report was outstanding, the examiner having dismissed the complaint (R. 40-41, and n. 5).



Miller and Danaher) in a per curiam decision which did not discuss the issues, affirmed the Board's decision and order except as to that portion of the order directing reimbursement of dues and fees paid to the union by all casual employees. Judge Edgerton, while concurring in the action of the majority in refusing to require such reimbursement of dues and fees, dissented from the majority's upholding of the Board's conclusion that the union's exclusive hiring hall or referral agreement violated the Act on its face. The basis for his dissent and for his conclusion that the Board's order should be set aside was as follows: Union hiring hall agreements or their equivalents have consistently been held to be legal under the Act absent evidence that the union in fact practiced discrimination thereunder. In this instant case not only was there no showing or attempt to show any discrimination in practice but the hiring hall or referral arrangement itself expressly negated discrimination in requiring that employment be obtained "only on a seniority basis," irrespective of whether the "employee is or is not a member of the union," so that the parties could not discriminate without violating the agreement. The fact that the referral agreement did not contain the provisions required by the Board in the *Mountain Pacific* case does not make it unlawful, Congress not being concerned with the substantive terms of collective agreements. Slater, being a member of the Union in good standing, his discharge, far from being discriminatory, was rather for his failure to comply with the terms of a valid agreement, and it is not the purpose of the Act to furnish statutory protection to contract breachers. (R. 71.)

### SUMMARY OF ARGUMENT

#### A.

The dispatching service maintained by Local 357 is an example of what is commonly known as the union hiring hall. Hiring halls predominate in such important indus-



tries as maritime, stevedoring, and the building and construction trades, where employment is characteristically fluid and sporadic and the recruitment of a labor force by a particular employment is tailored to the requirements of a particular job. The confinement of the dispatching service in this case to the hire of *casual* employees identifies the element of the employment relationship which is ordinarily the reason for the operation of a hiring hall. It is designed to bring the worker and the job together by funneling both to a central point from which employment can be sought and obtained, regularized and shared, on an evenhanded basis. The union hiring hall is thus addressed to and solves a real economic need.

The referral agreement in the instant case is not and can in no way be declared invalid on its face; it can be performed according to its terms without effecting discrimination. Indeed, to follow its precise terms would ensure non-discriminatory hiring, and discriminatory hiring could result only if the terms of the agreement were breached. Seniority alone governs dispatch and is determined by industry service. And seniority commences on three months industry service "irrespective of whether such employee is or is not a member of the Union." Accordingly, not only does the agreement affirmatively establish that seniority is the controlling standard, but it also expressly negatives union membership or the lack of it as a factor in its determination.

The crux of the unfair labor practice prohibited by Section 8(a)(3) and (b)(2) is encouragement or discouragement of union membership by discrimination in employment. The operation of the dispatching service in accordance with the agreement entails no discrimination in employment. The dispatching service applies to all seeking casual employment, is open to all, and is open to all on the same terms. Nor is denial of casual employment to Slater except on proper referral discriminatory. This simply re-

quires Slater to perform his contractual obligation, the same as all other casual employees, to seek casual employment solely through the service. To require adherence to a collective bargaining agreement by the employees it covers is not discrimination in employment.

In the absence of discrimination in employment, it is irrelevant for the Board to assert that the operation of the dispatching service inherently encourages union membership. All benefits obtained by unions encourage membership, but only that encouragement which flows from discrimination in employment is prohibited. There was in this case no encouragement of union membership, purposeful or presumed, in any sense referable to either the employee's status as a union member or his performance of the obligations of union membership.

Nor was there any violation of Section 8(a)(1) or (b)(1)(A) of the Act. These safeguard employees from abridgement of their "exercise of the rights guaranteed in Section 7," and the latter confers on employees the right to "refrain from" union or concerted activity. The only activity in this case in which the employees were required to engage, and from which Slater sought to "refrain," was to seek casual employment only through the dispatching service if they chose to seek it at all. This is an obligation imposed by contract. Section 7 of the Act confers no protected right upon an employee to refrain from complying with an agreement.

The Board's invalidation of the dispatching service rests exclusively on its presumption that the union will operate it discriminatorily. To indulge this presumption of illegal conduct is in fundamental conflict with the civilized premise that the "law will never presume that parties intend to violate its precepts. . . ." *Owings v. Hull*, 9 Pet. 607, 628. An illegal "purpose is not to be presumed. The presumption is the other way. To be established it

must be proved." *Mitchell v. United States*, 21 Wall. 350, 353. And in this case the proven facts do not permit but negative a conclusion that the dispatching service was actually discriminatorily operated or that the agreement contemplated any discrimination.

## B.

The Board has created a presumption that a union will operate a referral system of employment discriminatorily and it has further held that there is no means of overcoming this presumption short of acquiescence in incorporating into the agreement the three requirements the Board decrees. But the Board is without power to require insertion of substantive terms into a collective bargaining agreement as its price for the valid establishment of a referral system. *NLRB v. American National Insurance Company*, 343 U.S. 395 at 404 and 409, and *Local 24 Teamsters Union v. Oliver*, 358 U.S. 283 at 295. "The Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 at 108. And the three requirements formulated by the Board are in themselves objectionable: To grant the employer the right to reject any applicant referred by the union takes from the union the right to seek protection against rejection except for good cause; the requirement that the agreement explicitly provide that selection of applicants shall be on a non-discriminatory basis takes from the contracting parties the right to determine whether they wish to add a contractual prohibition of unfair labor practices to the statutory obligation which already exists as a matter of law; and the requirement for posting of the hiring or referral agreement is one which can only be predicated on a prior finding of the commission of an unfair labor practice. See *Art Metals Construction Company v.*

*NLRB*, 110 F. 2d 148 at 147 (C.A. 2). The Board thus begins with the presumption of illegality, which it has no power to indulge, and proceeds to the requirement that certain provisions be inserted into the agreement in order to overcome the presumption, which it has no power to impose.

## C.

Slater was a member of Local 357 in good standing. There was no showing that he was in default in the performance of any obligation of union membership. Accordingly, neither lack of union membership or default in the discharge of an obligation of union membership could be, and there is no claim, showing, or finding that these were, the foundation for any action against Slater. On the contrary, the express finding is that the Company discontinued Slater's employment as a casual employee solely because he had obtained casual employment with it without recourse to the dispatching service, in compliance with Local 357's request not to employ him in that capacity except on proper referral, (R. 49-55). To have permitted Slater to retain his casual employment with the Company, secured by him in violation of the agreement, would have been to discriminate in his favor and against all the other employees who were fulfilling their contractual obligation to work through the dispatching service. Action by an employer and a union to secure an employee's adherence to the terms of an agreement is not and cannot be discrimination in employment. *N.L.R.B. v. Furriers Joint Council*, 224 F. 2d 78 (C.A. 2), affirming the views of the dissenting Board member and the examiner, 108 N.L.R.B. 1506, 1511, 1520-1522; *N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, 80.

As stated by Judge Edgerton in his dissent below, "To interpret the Act as 'furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts' would not be 'consistent with the

underlying purpose of the Act to promote . . . collective bargaining agreements. . . . *NLRB v. Furriers Joint Council*, 224 F. 2d 78, 80 (2d Cir.)."

The Board's asseveration of encouragement of union membership also glosses over the fact that it is the employer's "purpose" to encourage which is "controlling." Specific proof of intent is unnecessary only in the sense that its existence is inferrable from the character and consequence of the conduct. The only relevant conduct disclosed in this case is the operation of a dispatching service not discriminatory either in its general or specific application. From these bare facts nothing is inferrable as to either the Company's or Local 357's purpose except that they sought to regularize casual employment and to require an employee who circumvented his contractual obligation to adhere to it. Especially is this so when it is remembered that the Company and Local 357 were operating under a master agreement negotiated by fifteen local unions and an association representing about one thousand employers. Surely an industry-wide purpose to engage in prohibited encouragement of union membership is not inferrable.

#### D.

A remaining issue in this case concerns the validity of the Board's order requiring the Company and Local No. 357 to reimburse all casual employees for union dues and initiation fees paid by them during the term of the alleged illegal referral agreement. Since the principal argument on this will be made by the petitioner in case No. 68 this term, which has been consolidated with the instant case, a summary only of the argument that such order is invalid and constitutes a punitive exercise of the Board's remedial authority not adapted to the situation requiring redress is set forth in Part II of this brief at page 50 to which the Court is respectfully referred.

## ARGUMENT

- 1. It is not an unfair labor practice to incorporate a requirement in a collective bargaining agreement that casual employment shall be secured solely through a dispatching service maintained by the union and to enforce that requirement by denying casual employment to a worker except on proper referral.**

On the merits the basic question in this case is whether a union may lawfully operate a dispatching service in accordance with a collective bargaining agreement providing that employers shall hire casual employees solely upon referral from the service unless workers are not available from that source, without incorporating into the agreement the three requirements that the Board decrees. To show that this question should be answered yes, we shall (1) analyze the terms of the agreement and describe the economic problem to which such agreements are addressed; (2) analyze the terms of the statute and consider the authoritative gloss which the precedents have given the statute; and (3) treat with the Board's presumption that the union will act discriminatorily and its inferences of illegality from the bare existence of the referral agreement, and its further assertion that this presumption and these inferences can only be overcome by explicit incorporation into the agreement of the three requirements formulated by it.

### **A. The Terms Of The Agreement Pertaining To The Dispatching Service.**

The agreement provides that, where an employer operates within the territorial jurisdiction of a local union maintaining a dispatching service, an employer who desires to hire a casual employee "shall first call the Union or the dispatching hall designated by the Union for such help" (R. 63). Hiring of casual employees "from any other available source" is permissible if the dispatching service



notifies the employer that "such help is not available" through it, or if the employees dispatched "do not appear for work at the time designated by the employer" (R. 63).

Seniority governs dispatch. "Casual employees shall . . . be employed only on a seniority basis in the Industry whenever such senior employees are available"; "No casual employee shall be employed by any employer . . . in violation of seniority status if such employees are available . . ." (R. 62-63). Industry service determines the seniority of casual employees and union membership or the lack of it is expressly excluded as a criterion. "Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union" (R. 63). Seniority may be broken by discharge. "Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status" (R. 63). Finally, "An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement" (R. 62).

In short, hiring of casual employees is based on referral from the dispatching service. Seniority governs dispatch and is determined by industry service. And seniority commences on three months industry service "irrespective of whether such employee is or is not a member of the Union." Accordingly, not only does the agreement affirmatively establish that seniority is the controlling standard, but it also expressly negatives union membership or the lack of it as a factor in its determination.

#### **B. The Economic Problem To Which Exclusive Referral Agreements Are Addressed.**

The dispatching service maintained by Local 357 is an example of what is commonly known as the union hiring hall. Hiring halls predominate in such important industries



as maritime, stevedoring, and the building and construction trades, where employment is characteristically fluid and sporadic and the recruitment of a labor force by a particular employer is tailored to the requirement of a particular job. The confinement of the dispatching service in this case to the hire of *casual* employees identifies the element of the employment relationship which is ordinarily the reason for the operation of a hiring hall. It is designed to bring the worker and the job together by funneling both to a central point from which employment can be sought and obtained, regularized and shared, on an evenhanded basis.

It is common ground that the Union hiring hall is addressed to and solves a real economic need. The Board in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 896, n. 8, stated that:

It was to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants.

On October 26, 1949, the construction employer representatives serving on the National Joint Board for the Settlement of Jurisdictional sputes, appearing before the Senate Labor Subcommittee, made a full presentation concerning employment under union referral procedures and hiring practices in the construction industry in which they emphasized the salutary operation of such procedures and practices respecting both employers and employees within the industry and the vital function played by the construction unions in training and supplying skilled workers in a mobile industry. See hearings on S. 1973 before the Subcommittee on Labor and Labor-Management Relations of

the Senate Committee on Labor and Public Welfare, S2nd Cong., 1st Sess. 155 (1951).

Among other things, the construction employers there stated (id. at 158-9):

*The selection of workmen because of their qualifications should not be construed as unfair discrimination*—The men are generally selected for their qualifications, not for the kind of card they carry, or the absence of one. If, however, the selection of a workman solely because he can furnish evidence of training, experience, skill, safety training, cooperation, permanent connection and character references—in a given community by virtue of being a member of a given union which can vouch for these qualifications—in place of some workmen without substantiated evidence of such qualifications for the work to be performed, then the employer's choice must not be regarded as discrimination in favor of union membership and he must not be deprived of the right to use his own criteria in judging the qualifications. To do otherwise will destroy the production, quality, and efficiency of construction operations.

The construction employer should not be deprived of his right to select his source of labor supply, just as he selects his source of the various materials without charges of discrimination unless it is shown that the intent was to discriminate for or against membership in a certain union.

The economic facts and the experience with respect to hiring halls in the maritime industry are set forth in J. P. Goldberg's *"The Maritime Story,"* Harvard University Press, 1957, pp. 277-282.

The General Counsel of the Board during the process of this litigation below stated concerning the hiring hall in the maritime industry that:

... anyone familiar with the peculiar characteristics of maritime employment would agree that the recruit-

<sup>3</sup> Fenton, *Union Hiring Halls Under The Taft-Hartley Act*, 9 Lab. L. Jour. 393, 397 (1958); see also, Fenton, Address of June 27, 1958, 42 LRRM 101, 103.

ing of employees through hiring halls has vastly helped to avoid the graft, favoritism and indignities which in past years have attended job seeking in the industry, and that hiring halls have made possible a fair rotation of jobs and an even supply of labor in the best interests of seamen and shipowners alike.

And he further stated concerning the hiring hall in the building and construction industry that:

The building and construction industry is another and perhaps more familiar example. Needless to say, that industry is in many ways unique. It fits into few of the orthodox categories of industry or employment with which the Board prior to 1947 had been accustomed to deal. In the first place the industry is mobile. Generally speaking, the work of the industry is performed on separate project sites rather than at fixed locations. Contractors bid on or otherwise obtain a construction job, make arrangements to place the necessary equipment on the site, and hire the skilled artisans and laborers they need for the particular job. Upon completion of the job, they move on to a new job site and repeat the process. Of necessity, then, workers in the industry are rarely attached to a single employer. In the course of a given work year, employees are employed by a number of different contractors on a number of different construction sites. Employment is thus temporary and intermittent in nature.

This kind of employment relationship creates special problems both for the contractor and for the worker. The contractor, before he bids on or undertakes a project, must be apprised of such vitally relevant factors as the availability of a specialized labor force in the area where the project is to be performed and the cost of such a labor force. If he is a general contractor and will require one or more subcontractors to complete the job—as often as not a completion date for the project is fixed, and failure to meet that date invokes penalties—he also needs to have information relevant to their needs and costs. When he actually

*Ibid.*

undertakes the job, it is imperative that the workmen he procures actually possess the skills which he requires. Without laboring the point too much, it is obvious that the contractor, who is frequently a stranger to the area involved, cannot fulfill his needs on the basis of approaching individual workmen. The nature of his operation is such that he requires some central source both for his information and for his employment needs.

The individual workman in the construction industry is likewise handicapped. Unlike his counterpart, the industrial employee, he has no fixed locations at which he can apply for work. Construction projects are scattered, often located in remote areas, and advance information as to their location and employment needs is not widespread. Moreover, the practicability of a search for employment under these admittedly adverse conditions is aggravated by the fact that the employment, when and if obtained, is likely to be for a short term. By the same token, the construction worker, because of the very nature of the industry, lacks the assurance which his industrial counterpart has, namely, that proficiency in the performance of the job which he obtains is at least a minimum guarantee of continued employment.

Union hiring halls and referral systems are an answer to these reciprocal needs of the contractor and the worker.

The Joint Committee on Labor-Management Relations described the stevedoring situation on the west coast waterfront before the establishment of hiring halls as follows (S. Rep. No. 986, Pt. 5, 80th Cong., 2d Sess., 36-37):

"As the shape-up operates, each pier where work is to be done constitutes a labor market of its own. All longshoremen in search of jobs line up outside that pier and wait for the stevedore foreman to come along, tell them to shape up in a semicircle around him, and select the particular workers he needs. Those not selected must go to another pier and try again or wait (out in the weather or in the nearest saloon) for the next shape.

Under the shape-up system, there are usually several times as many men attached to the labor force as there are full-time jobs available on an average working day. The intense competition for employment resulting from this chronically glutted labor market leads to most vicious abuses, favoritism, discrimination, and downright bribery in hiring methods.

The States of New York and New Jersey hereby find and declare that the conditions under which waterfront labor is employed within the port of New York district are depressing and degrading to such labor, resulting from the lack of any systematic method of hiring, the lack of adequate information as to the availability of employment, corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character and integrity and neither responsive or responsible to the employers nor to the unconcealed will of the majority of the members of the labor organizations of the employees; that as a result waterfront laborers suffer from irregularity of employment, fear and insecurity, inadequate earnings, and unduly high accident rate, subjection to borrowing at exorbitant rates of interest, exploitation and extortion as the price of securing employment and a loss of respect for the law; that not only does there result a destruction of the dignity of an important segment of American labor, but a direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessities handled in and through the port of New York district.

Member Philip Ray Rodgers of the National Labor Relations Board stated in an address at the University of Washington on March 12, 1959 that:

There is no question that in many industries the hiring hall or referral system performs a valuable function. This is especially so in industries where jobs are of relatively short duration and of changing location as in the building and construction industry. Properly operated, hiring halls provide a fair and efficient method of bringing employees together with jobs to fit their skills without the necessity of their making endless rounds of scattered employers' establishments. They also benefit employers by enabling them to recruit

The employment of longshoremen on the New York New Jersey piers through the shape-up without a hiring hall led to the enactment of the New York New Jersey Waterfront Commission Act (McKinney's New York Unconsolidated Laws, §6700; New Jersey Stat. Ann. §32:23; 67 Stat. 541; in 4 L. R. R. State Laws 42:277) in an effort to regularize waterfront employment. Section I Article I of the findings and declarations of that Act states that:

a labor force of the required skills quickly and efficiently.

And Member John H. Fanning similarly stated in an address before the American Society for Personnel Administration at Jacksonville, Florida on February 6, 1959 that: "the Board recognized that hiring halls in many areas of industry have been of great usefulness to employees and employers, assuring the former of a fair distribution of available employment and the latter of a standard of competence they could not otherwise readily secure."

### C. The Validity Of The Dispatching Service Under The Express Provisions Of The Act.

With the illumination provided by the economic reason for being of hiring halls we turn to consider whether the dispatching service in this case, provided for and operated under the terms of the collective bargaining agreement, offends Section 8(a)(3) and (b)(2) 8(a)(1) or 8(b)(1)(A) of the Act as the Board found. It is immediately to be noted that the Act, both as enacted in 1947 and as amended in 1959, contains no language which expressly abolishes the union hiring hall or union job referral systems. Neither does the Act contain language establishing any conditions under which such halls or systems can be operated or which delegates to the Board any powers in these areas. Instead, the Board must rely upon the general language of Sections 8(b)(2) and the even more general language of Section 8(b)(1)(A) coupled with the language of Sections 8(a)(3) and (1).

Before and after these particular provisions were enacted Senator Taft made it entirely clear that Congress did not intend to invalidate union hiring halls or referral systems as such, but merely to outlaw certain discriminatory practices under them. He stated:

"In order to make clear the real intention of Congress, it should be clearly stated that *the hiring hall is*



*not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall . . .*

*"The majority report proceeds upon the erroneous assumption that . . . maritime unions cannot continue to have hiring halls . . . The National Labor Relations Board and the courts did not find hiring halls as such illegal but merely certain practices under them. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, so long as they are not so operated as to create a closed shop . . ." S. Rept. 1827, 81st Cong. 2d Sess. pp. 13, 14. (Emphases added).*

The above statement was made after the enactment of the Taft Hartley Act. A statement to similar effect was made, however, by Senator Taft during the course of debate on this Act:

*"As a matter of fact, most of the so-called closed shops in the United States are union shops; there are not very many closed shops. If in a few rare cases the employer wants to use the union as an employment agency, he may do so. But he cannot make a contract in advance that he will only take the men recommended by the union." (2 Leg. Hist. LMRA 1010) (Emphasis added).*

It is further significant (See *NLRB v. Local 679 [Curtis Bros.]* 362 U.S. 274) that for seven years following the enactment of Taft-Hartley in 1947 and until its decision in *Mountain Pacific*, the Board had steadfastly read the Act as not invalidating hiring halls or referral systems as such, but merely actual discriminatory practices carried on in their operation. See cases cited in dissent of member Murdock in the *Mountain Pacific* case, 119 NLRB at 887.

What in the above Sections in the Act relied upon by the Board now warrants its present conclusion that union-



operated hiring halls or referral systems are invalid regardless of practices under them?

Section 8(b)(2) makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(2) . . ." Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

The crux of the prohibition therefore is encouragement or discouragement of union membership by discrimination in employment. As the Supreme Court has explained (*Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 42-43).

The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

And it is clear that "Congress intended the employer's purpose in discriminating to be controlling" (*id.* at 44), although "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership" (*id.* at 45).

Turning to this case, the operation of the dispatching service in accordance with the terms of the agreement can be no violation because it entails no discrimination in employment. The dispatching service applies to all employees within the industry who seek casual employment from contracting employers. The same standard of seniority is uniformly applicable to all the employees. And that

standard is expressly made to operate evenhandedly "irrespective of whether such employee is or is not a member of the Union." Thus, the dispatching service applies to all seeking casual employment, is open to all, and is open to all on the same terms.

The operation of the dispatching service, not discriminatory in its general applicability, was not discriminatorily applied to Slater. He was a member of Local 357 in good standing. There was no showing that he was in default in the performance of any obligation of union membership. Accordingly, neither lack of union membership nor default in the discharge of an obligation of union membership could be, and there is no claim, showing, or finding that these were, the foundation for any action against Slater. On the contrary, the express finding is that the Company discontinued Slater's employment as a casual employee solely because he had obtained casual employment, with it without recourse to the dispatching service, in compliance with Local 357's request not to employ him in that capacity except on proper referral. (R. 49-55). To have permitted Slater to retain his casual employment with the Company, secured by him in violation of the agreement, would have been to discriminate in his favor and against all the other employees who were fulfilling their contractual obligation to work through the dispatching service. Action by an employer and a union to secure an employee's adherence to the terms of an agreement is not and cannot be discrimination in employment. *N.L.R.B. v. Furriers Joint Council*, 224 F. 2d 78 (C.A. 2); affirming the views of the dissenting Board member and the examiner, 108 N.L.R.B. 1506, 1511, 1520-1522; *N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, 80. And so, as the examiner concluded, "the employer's refusal, on demand of the Union, to continue to employ Slater as a casual employee unless and until he was dispatched to the job by the Union, constituted no violation of the Act on the part of either the Union or the Employer" (R. 49-50).

In the absence of discrimination in employment, it is irrelevant and unsound for the Board to insist, as it does, that the operation of the dispatching service inherently encourages union membership. So does the negotiation by a union of a substantial wage increase. So does a union's success in securing shorter hours, liberal retirement pensions, adequate severance pay, ample sick leave, and effective grievance adjustment. Are these too outlawed because they may encourage union membership?

The dispatching service is in the same class. It is an economic instrument valuable to the employers and employees in regularizing casual employment. A labor organization is a service institution, and whenever it does its job well, it encourages union membership. Necessarily, therefore, as the Supreme Court stated, only such encouragement or discouragement of union membership "as is accomplished by discrimination is prohibited" (*supra*, p. 20). There was no discrimination here.

The Board's asserveration of encouragement of union membership also glosses over the fact that it is the employer's "purpose" to encourage which is "controlling" (*supra*, p. 20). "[S]pecific proof of intent" is unnecessary only in the sense that its existence is inferrable from the character and consequence of the conduct. The only relevant conduct disclosed in this case is the operation of a dispatching service not discriminatory either in its general or specific application. From these bare facts nothing is inferrable as to either the Company's or Local 357's purpose except that they sought to regularize casual employment and to require an employee who circumvented his contractual obligation to adhere to it. Especially is this so when it is remembered that the Company and Local 357 were operating under a master agreement negotiated by fifteen local unions and an association representing about one thousand employers. Surely an industry-wide purpose

to engage in prohibited encouragement of union membership is not inferable.

The difference between this case and the situations where intent may be presumed is evident from the three cases which were united in the single opinion in *Radio Officers*. In *Radio Officers* itself the union sought, contrary to the terms of the agreement, to require the hire of employees solely upon referral from the hiring hall; access to the hiring hall was restricted to union members in good standing; and the union placed a member in bad standing and declined to clear him for employment because of his failure to adhere to a membership rule (347 U.S. at 28-33). In *Teamsters*, an employee's seniority was reduced because of delinquency in his payment of union dues although no valid union security agreement was in effect authorizing compulsory dues payment (*id.* at 24-28). In *Gaynor*, the employer withheld wage and vacation benefits from nonmembers of a union, while granting these benefits to union members who, except for their membership status, were in the same position as the nonmembers (*id.* at 34-38). Thus, in each case, detriment to the employee was directly referable to union membership, an obligation of union membership, or both. In this case, on the other hand, the dispatching service is not based on either union membership or an obligation of union membership.

In short, there can be no violation of Section 8(a)(3) and (b)(2) in this case for two reasons: First, there was no discrimination in employment, which renders irrelevant any inquiry into encouragement of union membership; second, there was no encouragement of union membership, purposeful or presumed, in any sense referable to either the employee's status as a union member or his obligation of union membership.

We reach the question whether, apart from Section 8(a)(3) and (b)(2), there was a violation of Section 8(a)(1) and (b)(1)(A). The Board's finding of a violation of

the latter provisions is derived solely from its finding of a violation of the former and has no independent significance. The two fall together.

The Board argued below that, even if a violation of Section 8(a)(3) and (b)(2) is not established, a violation of Section 8(a)(1) and (b)(1)(A) is made out. This is an argument easily met. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7"; and Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7. . . ." Section 7 *inter alia* confers on employees the right to "refrain from" union or concerted activity. The only activity in this case in which the employees were required to engage, and from which Slater sought to "refrain", was to seek casual employment only through the dispatching service if they chose to seek it at all. This is an obligation imposed by contract. And it hardly needs to be labored that "employees lawfully bound by contract . . . [are] not free to violate the agreement under the guise of engaging in concerted activities for mutual aid or protection or of refraining from so doing, within the meaning of Section 7"; "employees have no protected right under Section 7 to violate the valid provisions of a collective bargaining agreement." *N.L.R.B. v. Furriers Joint Council*, 224 F. 2d 78, 80 (C.A. 2), affirming the views of the dissenting Board member and the examiner, 108 NLRB 1506, 1511, 1520-1522; *N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, 80. And see the examiner's discussion in this case (R. 49-51).

It is apparent that the Board, in using the broad language of Section 8(b)(1)(A) to outlaw union operation of a referral system, is utilizing the same device which this Court recently struck down in the Curtis case (*NLRB v. Local 639* decided 362 U.S. 274). It was there made clear that the general language of Section 8(b)(1)(A) cannot be used by

the Board as a makeweight for its shifting concepts of union unfair labor practices under the Act, and that more specific language must be pointed to. In respect to the hiring hall, we have seen that there is none; all that has been outlawed under the only specific language to which the Board can point, namely Section 8(a)(3) or 8(b)(2), is an actual act or practice of discrimination based on union membership or the lack of it, and that is not present in this case.

**D: The Validity Of Dispatching Service or Hiring-Hall Arrangements as Determined in the Courts.**

The authoritative gloss which the precedents have put on the Act prior to the Board's decisions in the instant case, and in *Mountain Pacific* confirms our analysis of the statutory terms and establishes the validity of the dispatching service in this case. That gloss can be put in a nutshell. It is lawful to establish by contract that a union shall exclusively refer employees for work, so long as referral is made upon a nondiscriminatory basis, an employee being neither denied referral nor granted preference based on union membership or the performance of the obligations of union membership.

A "referral system is not *per se* invalid" and its operation becomes invalid only "if the union applies it discriminatorily." *N.L.R.B. v. Philadelphia Iron Works, Inc.*, 211 F. 2d 937, 943 (C.A. 3). See also, *Eichleay Corp. v. N.L.R.B.*, 206 F. 2d 799, 803 (C.A. 3). "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Co. v. N.L.R.B.*, 196 F. 2d 841, 845 (C.A. 8). "The action of an employer in hiring workmen through a union, by means of referrals from the union, is held not to violate the Act, absent evidence that the union unlawfully discriminated in



supplying the company with personnel." *N.L.R.B. v. F. H. McGraw and Co.*, 206 F. 2d 635, 641 (C.A. 6).

This position was elaborated by the Court of Appeals for the Ninth Circuit (*N.L.R.B. v. Swinerton & Walberg Co.*, 202 F. 2d 511, 514, cert. denied, 346 U.S. 814):

An employer violates §8(a)(3) and (1) of the Act if he requires membership in a labor organization as a condition precedent to employment. *N.L.R.B. v. Contrall*, 9 Cir., 1953, 201 F. 2d 853. The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a "guarantee that the union does not discriminate against non-members in the issuance of referrals." We do not believe *National Union of Marine Cooks and Stewards*, 90 N.L.R.B. 1099 (1950), supports this view. Although it was there noted that the provisions of an applicable labor contract prohibited such discrimination, the Board did not indicate that a referral system was *per se* improper absent a "guarantee" of non-discrimination. Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent. The rule which we deem proper was recognized by the Board in *Hankin-Conkey Const. Co.*, 95 N.L.R.B. 433 (1951), where it was said an agreement that hiring of employees be done only through a particular union's office does not violate the Act "absent evidence that the union unlawfully discriminated in supplying the company with personnel." 95 N.L.R.B. at 435.

As the Court of Appeals for the First Circuit explained in *N.L.R.B. v. International Association of Heat and Frost Insulators*, 261 F. 2d 347, 350:

It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system the employer calls upon the union to supply him with the necessary workers. However, if this



system operates so as to discriminate against non-union workers and makes possible only the employment of union members, it is an unfair labor practice.

The above case was decided subsequent to the Board's decision in *Mountain Pacific* but the doctrine as such was not discussed or adverted to in the case. The validity of the doctrine itself was directly put to issue in five of the circuits courts to date. Two of the circuits — the Court below, which affirmed the doctrine without discussion, and the First Circuit upheld the Board, and the remaining three circuits have rejected the doctrine, holding that the Board was without warrant or power to declare exclusive hiring-hall procedures to be unlawfull per se or to impose its three conditions; rather, said these courts, the Board is required in each case to produce proof of actual discrimination in practice or operation. These cases are:

*NLRB v. E&B Brewing Company*, 276 F. 2d 594, 46th Circuit, April, 1960)

*NLRB v. Mountain Pacific Chapter*, 270 F. 2d 425, (9th Circuit, August, 1959)

*Morrison-Knudson v. NLRB*, 275 F. 2d 914, (2nd Circuit, March, 1960)

*Morrison-Knudson v. NLRB*, 276 F. 2d 63, (9th Circuit, March, 1960)

*NLRB v. New Syndicate*, 46 LRRM 2295, (2d Circuit, May, 1960)

*NLRB v. Local 176, Carpenters*, 276 F. 2d 583, (1st Circuit, March, 1960.)

The *Mountain Pacific Chapter* case above involved the Board's case in which the doctrine was first promulgated and the court had no hesitancy in saying "the hiring hall is legal and has always been held so." In the second case,

involving the doctrine to reach that circuit—*Morrison-Knudson, supra*—that Court elaborated as follows:

"It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system the employer calls upon the union to supply him with the necessary workers."

In short, the necessities which make the use of a hiring hall dispatch system a reasonable procedure were magnified in Alaska on these Morrison-Knudson jobs. Of course, if such a system, otherwise lawful, is operated in an unlawful manner so as to discriminate against nonunion workers, and so as to provide only the employment of union members, then the arrangement may become an unfair labor practice. "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Const. Co. v. National Labor Relations Bd.*, 8 cir., 196 F. 2d 841, 845.

The Board might suspect or surmise that the Union may have used its dispatch system to discriminate against nonunion men, or to compel or encourage applications for membership. But such speculations are no substitute for proof of improper use of the system—much less for proof of an understanding that dispatching should be conditioned on union membership.

Sixth Circuit in the *E&B Brewing* case above, characterized the Board's position as follows:

"As we understand the Board's position, it is that its experience proves that its effort to pick off the sour fruit frequently appearing on the hiring hall tree has been ineffective and altogether frustrating, so now it proposes to chop down the whole tree whenever it is not propped up by the Board's three 'protective clauses'."

**E. The Board's Invalidation Of The Dispatching Service  
Based On Its Presumption That The Union Will  
Operate It Discriminatorily.**

In spite of court decisions then available ~~■~~ it which upheld the hiring hall, and in disregard of seven previous years of Board history upholding the hiring hall device, the Board nevertheless held that the provision here establishing the dispatching service is invalid on the face of the agreement. Its essential reasoning is set forth in its decision in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883 at 893-897 discussed infra. In essence, its reasoning is as follows: "The agreement vests in the union exclusive authority to refer employees for casual employment." Accordingly, (1) this exclusive union operation of the employment service "inherently" encourages union membership, job applicants being compelled to cater to the union if not to become outright members in order to ensure against nondiscriminatory treatment; and (2) by the very nature of the referral system "it is reasonable to infer" that the union will exercise its authority discriminatorily by denying referral to employees because of nonmembership or default in the performance of a membership obligation; this anticipated discrimination in employment in the operation of the dispatching service encourages union membership by inducing employees to join the union and adhere to its rules in order to avoid loss of work from incurrence of the union's displeasure.

We have already touched upon point (1) of the Board's reasoning that the exclusive referral system constitutes an "inherent" discrimination. (*supra*, p. 27). We have there noted that a union is basically a service institution and any service it well performs will "inherently" encourage union membership. Thus, effectiveness in accomplishing better conditions of employment through collective bargaining will encourage such membership, and, to mention a close paral-

led, even more so will effectiveness in adjusting grievances through exclusive union representation: indeed, the mere element of exclusiveness in connection with grievance representation should on the Board's premise outlaw all such procedures. Further, on the exact same premise of exclusive avenue of employment, the Board should condemn, as an inherent discouragement of union membership, any practice in which the employer alone through his privately operated employment service or employment office hires all of his employees, particularly where the employer is known to be opposed to unions. In that situation, just as much as in the situation where the union is the exclusive source of employment, it can be said that there are factors inherently working to discourage union membership, yet it has never as much as been suggested that employers or even known anti-union employers be denied the right to hire their own work force without proof of actual discrimination. Finally, the Board forgets, in the instant case, that the contract itself expressly prohibits discrimination by stating that seniority in employment alone is the controlling factor without regard to union membership.

Thus, it is clear that the Board's conclusion of "inherent" encouragement of union membership could make sense only if it is assumed that the contract will be breached and if it be presumed that the union will in fact operate the hiring hall discriminatorily by preferring members and disadvantaging nonmembers. Of course, casual employment will be denied to employees who attempt to secure it without recourse to the dispatching service, but in the absence of an additional vitiating factor of actual discrimination, all that this demonstrates is that the employee must do what the contract requires, and the contract is between the employer and the lawful exclusive representative of all such employers' employees.

But it cannot constitute invidious discrimination to insist that an employee who wishes casual employment seek

it through the means that the contract provides. "A labor agreement is a code for the government of an industrial enterprise" (*Aeronautical Industrial Lodge v. Campbell*, 337 U.S. 524, 528), and freedom from discrimination does not free the employee from obedience to the code any more than it frees the citizen from obedience to the law. The statutory prohibition against discrimination in employment does not license industrial anarchy.

The Board, at least in its brief below, sought to bolster its "inherency" argument by insisting that under any exclusive union referral system, employees will "reasonably feel" that the union will discriminate against them.

This is reliance upon the presumption once removed. For the Board cannot subscribe to the reasonableness of the employee's belief without also endorsing the validity of the employee's appraisal upon which any such belief must rest. And to reasonably justify the belief the appraisal must be that the union will act discriminatorily. To condemn the union on the basis of an employee's belief, in the absence of an overt discriminatory act on the union's part, is to embrace with a vengeance the crime of imagining the king's death. For the union stands condemned not for what it did, or even for what it thought, but for what another thought. But, as Mr. Justice Jackson has said, "I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred." *American Communications Assn. v. Douds*, 339 U.S. 382, 437. And, *a fortiori*, "We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others." Mr. Justice Brennan in *In re Sawyer*, 360 U.S. 622, 635.

Turning now to the Board's point (2) above, it is clear from the Board's reasoning thereunder and the foregoing discussion, that the Board's invalidation of the dispatching service must necessarily rest exclusively on its presumption that the union will operate it discriminatorily.

To indulge this presumption of illegal conduct is in fundamental conflict with the civilized premise that the "law will never presume that parties intend to violate its precepts."

"*Owings v. Hull*, 9 Pet. 607, 628. An illegal "purpose is not to be presumed. The presumption is the other way. To be established it must be proved." *Mitchell v. United States*, 21 Wall. 350, 353. What the Supreme Court said of interstate carriers applies with equal force to labor organizations (*Cin., N.O., & T.P. Ry. Co. v. Rankin*, 241 U.S. 319, 327):

It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and, in respect of transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law "presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite, et solemniter esse acta, donec probetur in contrarium*."

In short, "A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts." *Cin., P.B.S. & P.P. Co. v. Bail*, 200 U.S. 179, 184. The established facts in this case do not permit but negative a conclusion that unlawful results were contemplated. On the face of the agreement seniority governs the operation of the dispatching service and seniority is to be determined "irrespective of whether such employee is or is not a member of the Union." There is no claim or evidence that Local 357 applied the dispatching service in a discriminatory fashion for the more than one year it had been in operation (R. 56-57, 58). The single incident established in the record of specific application of the service shows that an employee who circumvented the service

was required to adhere to his contractual obligation of securing casual employment through and there is nothing to show that the dispatching service was not established by the parties to realize its plain economic purpose of regularizing casual employment, of providing the employers with an efficient means of hiring casual labor, and of assuring the employees of a fair, evenhanded, and dignified means of securing casual employment.

And it will not do for the Board to say that other parties have operated other referral systems discriminatorily. We do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law or to justify making such a presumption." *Rountree v. Smith*, 108 U.S. 269, 276. The Board asserts, and it is therefore its burden to establish (*Clews v. Jamieson*, 182 U.S. 461, 488-491), the invalidity on its face of this contract between these parties. "The burden of showing illegality is upon the party asserting it and it is not sufficient merely to create confusion and suggests doubts as to its legality." *Palmer v. Chamberlin*, 191 F. 2d 532, 539 (C.A. 5). "Such a contract being illegal is not to be presumed; it must be established in evidence." *Thornton v. Bank of Washington*, 3 Pet. 36, 42. "There being no evidence to the contrary, we must adopt the assumption of ordinary life and of law that the trustees . . . acted lawfully. . . ." *Kerkly v. Springfield Institution For Savings*, 245 U.S. 330, 336. "It is not to be presumed the parties intended to make a contract which the law does not allow" (*Bank of Kentucky v. Adams Express Co.*, 92 U.S. 174, 181), and "an illegal intent accompanying the performance of a perfectly legal act cannot be presumed" (*Clews v. Jamieson*, 182 U.S. 461, 493).

It may be that the Board, as a body of experts, has authority to draw reasonable inferences, presumably informed by its specialized experience, from the "evidential



facts." *Radio Officers' Union v. NLRB*, 347 U.S. 17, 48-50. But there must be evidential facts from which to draw the inference. There are none here. An inference cannot be drawn from the air. Particularly the Board cannot say, in defiance of every tenet of civilized jurisprudence, that "it is reasonable to infer" that the contracting union will act discriminatorily. *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 896 "Commission expertise alone cannot support [such] pivotal assumption[s]." *Harrell v. F.C.C.*, 267 F.2d 629. And especially is this so when the assumption is that a person will violate the law.

And the Board's power to draw inferences and to exercise its "expertise" is now more narrow than that permitted by this Court in such decisions as *Republic Aviation v. NLRB*, 324 U.S. 793 and *American Company v. NLRB*, 324 U.S. 793. This is by reason of the change made by Congress in Sections 10 (c) and 10 (e) of the Act when it enacted the 1947 Taft-Hartley amendments. The legislative history underlying the change in Section 10 (c) from "all the testimony" to "the preponderance of the testimony" and in 10 (e) from "evidence" to "substantial evidence on the record considered as a whole" plainly indicated the Congressional intent to require the Board to support its findings and conclusions by facts rather than inferences, and by evidence rather than by expertise.

H. Conf. Rept. No. 519 on H.R. 3020, 80th Cong. 1st Sess. at pp 55-56 states:

"In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and fact (*NLRB v. Hearst Publications, Inc.*, 322 U.S. 111; *NLRB v. Packard Motor Car Co.*, decided March 10, 1947), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Aviation*).

*tion v. NLRB*, 324 U.S. 793; *Le Tourneau Company v. NLRB*, 324 U.S. 793).

"... presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions:...

"(T)he courts ... will be under a duty to see that the Board observes the provisions of the earlier sections [10 (b) and 10 (c)] and that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reason for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in ... [the] *Republic Aviation* and *Le Tourneau*, etc. cases ... without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (c) of the amended act."

A final vice of the Board's position of per se of legality is that it relieves the General Counsel of his burden of proof under Section 10 of the Act. (*NLRB v. D. Gottlieb and Co.*, 208 F. 2d 682, C.A. 7 (1953); *NLRB v. Miami Coca Cola Bottling Co.*, 222 F. 2d 341, C.A. 5 (1955); *NLRB v. West Point Manufacturing Co.*, 245 F. 2d 783, C.A. 5 (1957). This burden of proof never shifts. (*NLRB v. Winter Garden Citrus Products*, 260 F. 2d 913, C.A. 5 (1958). The "burden to make out a case of discrimination rests continuously on, and does not shift from, Board to Respondent." *N.L.R.B. v. Brady Aviation Corp.*, 224 F. 2d 23, 25 (C.A. 5). See also, *Local No. 3, United Packinghouse Workers of America v. N.L.R.B.*, 210 F. 2d 325, 329 (C.A. 8), cert. denied, 348 U.S. 822; *Interlake Iron Corp. v. N.L.R.B.*, 131 F. 2d 129, 134 (C.A. 7).

Even the fact that an arrangement has an inherent capacity for discriminatory application and is administered by a party with strong bias in the matter does not shift the burden of proof. (*Interlake Iron Corp. v. NLRB*, 131 F. 2d, 129 (C.A. 7). This fundamental requirement with respect to the burden of proof would, as was specifically ruled in *NLRB v. Sarnerton*, 202 F. 2d 511 (C.A. 9), be disregarded by the rule promulgated by the Board.

**F. The Three Requirements Which The Board States Must Be Incorporated In An Agreement In Order To Validate A Hiring Hall.**

The logic of the Board's position would require it to conclude that a hiring hall can never be validly established. The Board quivered on the brink of this conclusion but withdrew. It stated instead that (*Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 897).

"We believe, however, that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be non-discriminatory on its face, only if the agreement explicitly provided that:

(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement."

And the Board later stated that, to validate a referral system, the "three criteria" laid down must be "met *fully and in toto*" in order to "save such an exclusive arrangement from the interdiction of the Act." An agreement which does "not meet all of the criteria required . . . is *ipso facto* invalid and in violation of the Act." *K. M. & M. Construction Co.*, 120 NLRB No. 140.

The vice of the Board's position thus cuts deeper than even indulging a presumption of illegal conduct and shifting the burden of proof. It is not simply a question of placing the risk of non-persuasion upon the accused rather than the accuser. For there is no means of persuading the Board of the licit purpose of the contracting employer and union short of acquiescence in incorporation into the agreement of the three requirements the Board decrees. As we now show, the Board is without power to require insertion of substantive terms into a collective bargaining agreement as its price for the valid establishment of a referral system of employment.

■ "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283, 295. In the achievement of this goal "the Board may not, directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective

"The Board in its brief below argued that there is no need to inquire into the validity of the foregoing "three criteria" or its power to prescribe them for the reason that there is no compulsion to accept them and the parties need not maintain any particular kind of hiring system. Since the alternative to complying with the requirements is to relinquish the operation of a hiring hall, it seems obvious that the Board cannot impose "a choice between the rock and the whirlpool" without establishing its power to act at all and the validity of what it does do. *Frost v. Railroad Commission*, 271 U.S. 583, 593.

bargaining agreements." *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 404. What an agreement should contain "is an issue for determination across the bargaining table, not by the Board" (*id.* at 409); the parties "are to work out their agreement themselves" (*Local 24, Teamsters Union v. Oliver, supra*).

For the Board to say that parties who desire to establish a referral system of employment must contract for it on its terms or not at all is thus in fundamental conflict with the scheme of the Act. The Board "has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice" (*Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93, 108), and it *a fortiori* has no power effectively to compel additions to the agreement regardless of any element of an unfair labor practice. The vice in the Board's position is thus twofold. It strikes down the contractually established dispatching service as invalid on its face although there is no element of an unfair labor practice in it except that which the Board draws from its presumption of unlawful conduct. It then confronts the parties with the choice between foregoing a referral system or acquiescing in the Board's formulation of it although the Board is without power to require incorporation of substantive terms into an agreement. The Board thus begins with a presumption of illegality, which it has no power to indulge, and proceeds to a requirement that certain provisions be inserted into the agreement in order to overcome the presumption, which it has no power to impose.

**1.** The Board states that the agreement must "explicitly" provide that "The employer retains the right to reject any job applicant referred by the union." This requirement is objectionable in three respects:

(a) This requirement takes from the employer and the union the right to agree that a job applicant referred by

the union shall not be rejected except for good cause. In a question and answer guide to explain the application of *Mountain Pacific* the General Counsel of the Board stated unequivocally that this was his interpretation (5 CCH Lab. Law Rep. ¶50,087, p. 50, 269, question 15(f)):

Question 15(f): One of the criteria set forth in *Mountain Pacific* is that the employer is given the right to reject a worker sent from the non-discriminatory list. Assuming that the union is operating the list in a non-discriminatory manner, may the union and contractors agree that workers will *not* be rejected, save for a good cause, i.e., lack of qualifications, ability, etc.? Assuming that the answer is "yes" could the union and contractors agree to refer a dispute over what constitutes "good cause" to the grievance procedure? \* \* \*

Comment: By the express terms of *Mountain Pacific* the contract between an employer and union who are party to an exclusive hiring arrangement must provide, among other "safeguards," that the "employer retains the right to reject *any* job applicant referred by the union" (emphasis supplied). In the light of the unqualified language in which this criterion is phrased it would seem that the right of rejection contemplated thereby is an unconditional one, in no way limited, for example, by considerations of "good cause" such as Question 15(f) suggests. This conclusion appears supported, moreover, by the fact that this "safeguard" was clearly viewed by the Board as one wholly separate and apart from the requirement that the parties must further agree to post not only this but also those provisions of the contract establishing objective standards to be followed by the union in referring applicants for employment. Since such objective referral standards would themselves be based on the same factors which, as stated in Question 15(f), would constitute "good cause," i.e., the applicant's "qualifications, ability etc.," a right of rejection limited to "good cause" would provide no additional "safeguard" and accordingly would not constitute a separate criterion such as would appear to be required by the *Mountain Pacific* decision. \* \* \*

This graphically illustrates the Board's deep inroad into a subject which under the statute the parties are free to decide for themselves. Collective bargaining agreements almost universally safeguard employees from discharge or discipline except for good cause. It is a short step from this safeguard to contractual protection against arbitrary rejection of referred employees. Under the statute the decision whether or not to take this step is for the parties to make, not the Board.

The point deserves emphasis. It is undisputed that the employer and union may provide that the basis for referral shall be such non-discriminatory standards as seniority, length of previous unemployment, qualifications for the work, and the like. But says the Board, the employer must retain the right to reject any referred applicant. This means that if the union dispatches an employee it regards as competent, but the employer rejects him as incompetent, the employer must have the final say, with no leave even to adjust the dispute through the grievance and arbitration processes. And the same would be true of a dispute over seniority, length of unemployment, or any other objective criterion for dispatch. This is wholesale interference with free and private collective bargaining.

(b) The Board deprives the parties of their power of decision without any justification for this action even on the Board's analysis of the supposed mischief inherent in the referral system of employment. According to the Board the mischief lies in the union's presumed discriminatory denial of referral to employees who are nonmembers or who are in default in the performance of a membership obligation. But this supposed mischief is not to any degree overcome by empowering the employer to reject an employee who has been referred. The discrimination, if any,

<sup>1</sup> *Basic Patterns in Union Contracts*, 40:1 (Bur. Nat'l. Aff., 4th ed. Oct. 1957); Bull. No. 908-5, *Collective Bargaining Provisions, Discharge, Discipline, and Quits*, U.S. Dep't. Lab., Bur. Lab. Stat. (1948).



takes place upon the denial of referral. An employee who has been referred, and who is therefore the only one the employer can reject, cannot have been discriminated against. It hardly safeguards an employee from discriminatory denial of referral to deprive the union of the opportunity to bargain with and secure from the employer a provision protecting the referred employee from arbitrary rejection.

(c) In fact, in this case, the employers in practice appear to have and exercise the authority to reject a referred employee deemed unsatisfactory (R. 34-35). The agreement does not negative this authority. It provides that the employers may "discharge any employee for services not deemed by the employer to be satisfactory," subject to a procedure by which the "Union . . . may protest any discharge believed by the Union to be unjustified" (R. 63-64). This procedure is unavailable to a referred employee who has been rejected, because he cannot be said to have been discharged before he has been hired. In practical effect, therefore, the requirement upon which the Board insists does in fact exist. We must accordingly conclude that, for the Board, a fact does not exist unless it is acknowledged in the very words which the Board dictates. It is not the role of the Board to cross the "t's" and dot the "i's" for employers and unions engaged in collective bargaining.

2. The Board also requires that the agreement shall "explicitly" provide that "Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements" (*supra*, p. 44).

This requirement elaborates the statutory prohibition against discrimination and compels its incorporation into the agreement. Very often parties to collective bargaining

agreements do include in their compacts contractual interdiction of conduct which is also proscribed by the Act. For example, the agreement in this case provides that "No employee shall be discharged or discriminated against because of his membership in the Union or Union activities" (R. 63).

The consequence of contractual prohibition of unfair labor practices is to make the statutory obligation enforceable as a contract violation. It is for the contracting parties to decide whether they wish to undertake the burdens and to enjoy the advantages of this mode. Certain it is that it is not the function of the Board to make that choice for them. Yet that is precisely the effect of the Board's requirement that the statutory prohibition of discrimination be incorporated into the agreement.

Nor is it at all apparent how, on the Board's theory, it serves any purpose to include this provision in the agreement. A person who, on the Board's presumption, will violate the statute, will, on the basis of the same presumption, just as readily violate the contract. One does not expect truth by exacting an oath from a perjurer.

3. The third requirement which the Board states must "explicitly" be incorporated in the agreement is that "The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions pertaining to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement" (*supra*, p. 44).

The Board is empowered, based on a finding that a person has engaged in an unfair labor practice, to require that person to post notices stating he will not engage in such conduct (*International Brotherhood of Teamsters*,

*Local No. 554 v. N.L.R.B.*, 262 F. 2d 456, 463-464 (C.A.D.C.), 'except' if the wrong found suggests no need for posting (*N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226). But the essential precondition to the exercise by the Board of any power to require a person to post notices is a finding that the person has committed an unfair labor practice and an order based on that finding. See *Art Metals Const. Co. v. N.E.R.B.*, 110 F. 2d 148, 151 (C.A. 2). The Board has no power to require the posting of notices as a precondition to the valid establishment by contract of a referral system of employment.

The observations of board member Murdock dissenting in *Mountain Pacific* (119 NLRB at 889) in respect to the Board's requirement of the "three criteria" are illuminating. He said: "If a hiring hall results in unlawful discrimination because, as the majority finds, the union is arbitrary master and is contractually guaranteed to remain so, I fail to see how the inclusion of objective criteria in the contract can remove the element of discrimination or the encouragement of union membership. Under any circumstances the employer would have surrendered all hiring authority and the union would be free under the contract to refer or not to refer applicants regardless of any expressed objective criteria. I am as much concerned as is the majority that purported nondiscriminatory hiring halls be nondiscriminatory in fact. But I do not believe that this Board has the power to hold, on the one hand, that such conduct by a union and an employer is lawful, but on the other hand, that it is unlawful unless the contract contains words indicating an intention by the union to administer the contract lawfully. This is as much as to say that an employer violates Section 8 (a) (3) of the Act merely by discharging a union member unless at the same time he states that the discharge is for economic reasons. My understanding of the law is that the General Counsel must prove by a preponderance of the testimony that the discharge was intended to encourage or discourage union membership."

Absent such proof, no unfair labor practice has been committed whether or not economic reasons were assigned by the employer for the discharge at the time it occurred. My view of the law in this respect is so well settled that it needs no citation of authority. In my opinion, the majority's novel approach to the hiring-hall issue amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation. To my knowledge this is the first time that the Board or any court has found an unfair labor practice solely on the ground that the respondent failed to express a lawful motivation at the time the alleged unfair labor practice occurred."

#### **G. The Board Has Attempted to Legislate**

What a majority of the Board has attempted to do in this case and in *Mountain Pacific* is to incorporate their views as to what the law ought to be and disregard what the law actually states. But the Board cannot assume "a roving commission to inquire into evils and upon discovery correct them". *Schechter Poultry Corp. v. U.S.*, 295 U.S. 95, 551. It is for the Congress and not for the Board to establish policy. "That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate Palmolive Peet Company v. NLRB*, 328 U.S. 335 at 363. See also *Miller v. U.S.*, 294 U.S. 435 (1935) and *Work v. Mosier*, 261 U.S. 352 (1923).

It is no part of the function of the Board to be "a super Congress". *NLRB v. National Maritime Union*, 175 F.2d.

686, 691 (C.A. 2) cert. denied 338 U.S. 954. If, in "a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously" (*Rabouin v. NLRB*, 195 F. 2d 906, 912 (C.A. 2), the Board should proceed with equal caution.

The Board's conclusion that the referral agreement in this case was unlawful on its face is not sanctioned by the Act and is contrary to applicable principles of law. The decision of the court below affirming the Board's holding should be reversed.

**II. The Board's order requiring the Company and Local 357 jointly and severally to reimburse the casual employees for the union dues and initiation fees they paid is a punitive exercise of the Board's remedial authority not adapted to the situation requiring redress.**

By arrangement with counsel, the full exposition of the legal principles and other considerations which have moved the court below as well as all other circuit courts of appeal that have considered the question, other than the Seventh, to hold that the Board's reimbursement order under its so-called Brown-Olds Doctrine (*Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594) is invalid under the Act will be set forth by petitioner in case No. 6, this term which has been consolidated with the instant cases for presentation and argument. To avoid reiteration, the petitioner's position respecting the validity of the refund order in the instant case can be summarized as follows:

The refund order is based on an attenuated series of inferences; the Board presumes the union will operate the referral system discriminatorily; from this it infers that employees join the union in order to escape discrimination;

it next asserts that, since the act of joining the union was induced by fear of discrimination, payment of dues and fees was the product of illegal inducement; and it concludes that the dues and fees should therefore be refunded.

The argument is fallacious on numerous grounds:

The Board must assume that the casual employees joined the union *after* the institution of the dispatching service. For if the employees joined the union *before* the operation of the dispatching service began, there is no basis for the Board's assumption that the employees joined in order to protect their employment from discriminatory denial of referral. Membership which preceded the dispatching service could not have been caused by it. The Board assumes this critical fact—that membership followed rather than preceded the dispatching service—without an iota of evidence to support the assumption; for all the Board can know a large percentage of the employees, whose dues and fees have been ordered reimbursed to them, joined when there was no dispatching service in effect.

But even if it could be assumed that every member joined subsequent to the time when the referral service was in operation, nevertheless, the reimbursement order must fall.

The fundamental vice in the Board's position lies in its basic assumption, made in disregard of the whole history of the growth of the labor movement, that the employees had no important incentive to join Local 357 or any other union operating a hiring hall except to escape presumed discriminations against them. But labor unions "were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. . . . Union was essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209. There is no evidence in the record in this case to support an assumption that the union membership of the casual em-

ployees was not part of this main stream. It "is left to mere conjecture to what extent membership . . . was induced by any illegal conduct. . . . To say that of the . . . [casual employees] who did join there were not those who joined voluntarily . . . would be to indulge an extravagant and unwarranted assumption." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 238.

It is uncontested that Local 357 is the free choice of a majority of the employees to represent them in collective bargaining. Experience has demonstrated overwhelmingly that employees who choose to be represented by a union in collective bargaining also choose to pay union dues and fees to it. There is nothing in this record to warrant any different assumption by the Board in this case. Thus, there is no showing or no attempt by the Board to show that any one of the many hundreds of employees to whom repayments of dues and fees has been ordered had joined their union involuntarily or under coercion, let alone that the existence of the referral agreement had induced or even motivated them to become union members. Lacking a causal relationship between the alleged wrongful activity and damages allegedly caused by the activity, the Board, in ordering reimbursement on a blanket basis, proceeds punitively and without regard for the law. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 at 10.

Employees voluntarily pay fees and dues because they know they cannot have the benefits of union representation without contributing to its cost. To require the reimbursement of dues and fees means that the casual employees will have received the benefits without sharing in paying the price. But it does not mean simply that. The moneys for reimbursement must come from somewhere; and insofar as Local 357 is concerned, they must come from the fees and dues paid by the *regular* employees to whom the refund order does not apply. It serves no policy of the Act to have the *regular* employees pay for



the benefits secured equally by the *casual* employees. Nor does it serve any policy to drain a union's treasury and thus impair its capacity to fulfill its intraunion programs such as death, disability, insurance, and vacation benefits. Nor is it any answer to say that the Board's reimbursement order would have a deterring effect. "That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12.

### CONCLUSION

The decision below insofar as it sustains the Board's conclusion that petitioner committed an unfair labor practice in maintaining its referral or dispatching service should be reversed, and for the reasons stated above, the Board's order should be set aside in its entirety.

Respectfully submitted,

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August 24, 1960

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Nos. 64 and 85

Office-Supreme Court, U.S.

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JAMES R. BROWNING, Clerk

**In the Supreme Court of the United States**

**OCTOBER TERM, 1960**

**LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA, PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA**

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

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No. 61

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

---

No. 85

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## OPINIONS BELOW

The opinion of the Court of Appeals (R. 73-75) is reported at 275 F. 2d 646. The Board's Decision and Order (R. 37-47) are reported at 121 NLRB 1629.

(1)

### JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1960 (R. 72-73), and the decree on March 10, 1960 (R. 73-75). The petition for a writ of certiorari was filed on March 28, 1960, and the cross-petition on May 11, 1960. The petitions were granted on June 27, 1960, 363 U.S. 837 (R. 77).

### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization \* \* \*

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 \* \* \*

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership \* \* \*

#### QUESTIONS PRESENTED

1. Whether an agreement which requires an employer to obtain employees exclusively through a hiring hall operated by the union, but does not provide adequate assurances that job applicants will be referred without regard to their union membership, violates the provisions of the Act which forbid encouragement of union membership by discrimination in employment.

2. Whether the Board, as a remedy for such illegal hiring arrangement, may require that the employees be reimbursed for dues and initiation fees which they have paid to the labor organization under that arrangement.<sup>1</sup>

<sup>1</sup> A similar question as to remedy is presented in No. 68, *Local 60, United Brotherhood of Carpenters, AFL-CIO, et al. v. National Labor Relations Board*, which has been set for argument after the instant cases (363 U.S. 837). Accordingly, to

## STATEMENT

## A. THE BOARD'S FINDINGS

In 1955, petitioner Union executed a 3-year collective bargaining contract with the California Trucking Associations, which represented a number of motor truck operators located in the southern part of California, including Los Angeles-Seattle Motor Express (R. 55; 8-9). The provisions of the contract relating to hiring of casual or temporary employees were as follows (R. 62-63):

Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union.

Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first

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avoid duplication and in view of the fact that the unions have followed a comparable procedure in their briefs, the remedy question is treated in the Board's brief in No. 68. For the Board's position on that question, both in this case and in No. 68, we therefore respectfully refer the Court to the Board's brief in No. 68.

call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

Pursuant to these terms, the Union maintained a hiring hall for the dispatch of casual employees to the trucking companies who were parties to the agreement and were within the Union's jurisdiction (R. 49; 9, 10, 13).

Lester Slater was a member of the Union, and, for two years prior to the events in this case, had secured casual employment through the Union's hiring hall (R. 55; 14-17). In June 1955, Slater's dispatch card, which under the agreement entitled him to seniority status for referral purposes, was withdrawn by the Union as a result of an employer's removal of him from a job which he was unable to perform (R. 21-24, 63). Thereafter, in consequence of efforts made on his behalf, Slater received a letter from John Annand, International Representative of the Union, stating that the Union had informed him that "you [Slater] may seek work wherever you can find it in the freight industry without working through the hiring hall" (R. 54; 67).

On August 27, 1955, Slater managed to obtain employment with Los Angeles-Seattle Motor Freight Express, a party to the hiring hall agreement, by his own efforts, without being dispatched by the Union (R. 39; 29). Before being hired, however, the employer required him to supply a photostatic copy of



the letter from International Representative Annand (R. 29). Slater continued to work at Los Angeles-Seattle until November 10, 1955. On that day he was discharged by the Company when the Union, having learned of his employment, complained that the Company was violating the hiring agreement by employing Slater absent a referral from the Union and demanded that he be put off the job (R. 39; 26-27, 30). In discharging Slater in compliance with the Union's demand, the Company told him ~~not~~ to return to work until he had the matter "straightened out with the Union" (R. 12).

#### B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the hiring hall provisions of the contract in effect in this case obligated Los Angeles-Seattle Motor Freight Express, as a party thereto, to hire casual employees exclusively through the Union. In accordance with its decision in *Mountain Pacific Chapter, Associated General Contractors, et al.*, 119 NLRB 883, 897, the Board further found that this exclusive hiring arrangement did not contain the safeguards specified in that decision, and that it therefore violated Sections 8(a)(3) and (1), and 8 (b)(2) and (1)(A) of the Act (R. 37-38).

In the *Mountain Pacific* case the Board had concluded that a hiring arrangement which vested exclusive authority in a union to clear or designate applicants for employment constituted "discrimination in regard to hire or tenure of employment \* \* \* to encourage or discourage membership in any labor organization," in violation of Section 8(a)(3) and (1)



and the correlative Section 8(b)(2) and (1)(A), unless it contained adequate safeguards to assure employees that the union's power would be exercised without regard to union membership. The safeguards are discussed pp. 15, 51-60, *infra*.

Finding further that Slater's loss of employment was the result of the enforcement of the illegal hiring agreement, the Board concluded that his discharge similarly violated the same statutory provisions (R. 39).<sup>2</sup>

The Board's order directs the Union and Los Angeles-Seattle Motor Express<sup>3</sup> to cease and desist from the unlawful practices; and from in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. Affirmatively, the order requires the Company and the Union to take appropriate steps to prevent further discrimination against Slater, and to make him whole for losses in wages sustained by reason of the discrimination against him; to refund to the casual employees of Los Angeles-Seattle Motor Express the initiation fees and dues exacted from them under the

<sup>2</sup> The Board, although setting aside the Trial Examiner's ultimate conclusion, expressly adopted his finding that Slater was a casual employee within the meaning of the contract, and did not disturb his finding that the letter which Slater used to obtain his job with the Company "did not in fact constitute a referral according to the contractual provision relating to casual employees and practices under it" (R. 55, 39, n. 3).

<sup>3</sup> Los Angeles-Seattle Motor Express is the only employer of the signatories to the hiring agreement that was included in the unfair labor practice charges and complaint in this case (R. 47).

illegal hiring arrangement;<sup>4</sup> and to post appropriate notices. (R. 40-44.)

### C. THE DECISION OF THE COURT BELOW

The court below, with one judge dissenting, affirmed the Board's unfair labor practice findings in all respects, and granted enforcement of its order, except that portion requiring reimbursement of dues and fees paid to the Union by all casual employees of Los Angeles-Seattle Motor Express. The order was modified to confine the reimbursement provision to Slater alone. (R. 69-72, 73-75.)<sup>5</sup>

### SUMMARY OF ARGUMENT

#### I

Following its decision in *Mountain Pacific Chapter, Associated General Contractors*, 119 NLRB 883, 893, the Board determined in the present case that the hiring agreement between the Company and the Union—which vested the Union with exclusive authority to designate applicants for referral to jobs but did not contain the safeguards to protect nonunion applicants specified in *Mountain Pacific*—violated

<sup>4</sup> The Board limited liability to "the period beginning 6 months prior to the filing and service of the charges herein," and exempted "the period between the date of the Intermediate Report and the date of the [Board's] Order herein, as the Trial Examiner dismissed the complaint" (R. 40, n. 5).

<sup>5</sup> In the Court of Appeals Los Angeles-Seattle Motor Express did not actively oppose enforcement of the order against it, and has not joined in the petition for certiorari which was granted by this Court. It stipulated in the Court of Appeals, however, that any decree ultimately issued by that court in this proceeding would be binding upon it.

Sections 8(a) (3) and (1) and (b) (2) and (1)(A) of the Act. The violation of Sections 8 (a)(3) and (b)(2) turns on a showing that the contract provides for discrimination respecting employment which encourages union membership. In both aspects of illegality—discrimination and encouragement—the statute was violated by the hiring agreement in this case.

A. The divided structure of Section 8(a)(3), which deals separately with “discrimination” and “encouragement”, shows that the former term refers to a disparity of treatment between employees in their hire or employment, and that the latter term describes the kind of disparity which is forbidden. The division of the job applicants by the contract in the present case into those who are cleared for employment through the hiring hall and are thereby eligible for work, and those who are not so cleared and are thereby precluded from working, thus constitutes discrimination within the statutory meaning.

The Union would blur this uncomplicated interpretation by reading “discrimination” to imply a difference in treatment based upon the union status of applicants or employees, and would conclude therefrom that the hiring agreement in this case involves no element of discrimination because it does not expressly provide that union members shall be treated differently than nonmembers. By thus restricting the scope of the term “discrimination” the Union’s reading divests the subsequent encouragement or discouragement requirement of any meaning or purpose, and at the same time improperly restricts the kind of

discrimination which Congress sought to proscribe. Under the Board's reading, on the other hand, discrimination is given its common meaning of difference in treatment, and when such differences are established, as in the present case, it becomes necessary to determine whether the purpose, or foreseeable consequence, thereof is to encourage or discourage union membership. If it is, a violation of Section 8(a)(3) is established.

The Board's interpretation is supported by the decision of this Court in *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17.

B. The phrase "to encourage or discourage membership in any labor organization" is not of fixed meaning, but reflects a general Congressional policy of protecting the exercise of employee rights to participate in, or to abstain altogether from, unionism. The task of particularizing the area in which this language has application has been vested in the Board as the agency specializing and experienced in the field covered by the Act.

The Board has had extensive experience with the hiring hall in its administration of the Act. This method of obtaining employees originally developed hand-in-hand with the closed shop. In 1947 Congress outlawed the closed shop, and continued the Board's authority to proscribe any other form of discrimination in employment, with an exception immaterial here, which has the necessary tendency of encouraging union membership. Both the Board's experience and available outside evidence have shown, however, that the hiring hall has been frequently, if not

predominantly, characterized in the years since 1947 by preferential treatment of union members.

In the light of its familiarity with the problem, the Board could reasonably conclude, as it did in its *Mountain Pacific* decision, that an applicant, knowing only that his employment can be obtained through referral by a union, "will fear that his opportunity of selection will be small if he does not become a union member." \* \* \* *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 585 (C.A. 1). In the absence of effective safeguards that guarantee fair treatment of nonunion applicants, the job seeker cannot be assumed to be insensitive to the widely known fact that hiring halls have frequently preferred their members in making referrals. By making his employment turn upon an exercise of union power, an exclusive hiring agreement necessarily precludes a free exercise by him of his right to refrain from unionism.

Since, as shown above, the hiring hall arrangement itself involves discrimination within the meaning of Section 8(a)(3), the further showing that such halls have a tendency to encourage union membership or adherence to union policies suffices to establish the violation of Sections 8(a)(3) and (b)(2). There is thus no occasion to show that the particular hiring hall in fact operates to the disadvantage of nonmembers. Accordingly, the Union errs in ascribing to the Board a presumption that the hiring hall will operate in this fashion. The Board has made no such pre-

sumption, nor does its application of the statute require it.

## II

The same considerations which underlie the Board's finding of a violation of Sections 8 (a) (3) and (b) (2) show also that the hiring hall in this case violates Sections 8 (a) (1) and (b) (1) (A). The latter provisions prohibit an employer and union, respectively, from restraining or coercing employees in the exercise of their right, *inter alia*, to refrain from union membership and from engaging in union activities. Just as a union-operated hiring hall, in the absence of any safeguards of fair treatment for the nonunion applicant, encourages union membership, so does it deprive applicants of any meaningful freedom to refrain from unionism. Conduct which may reasonably cause employees to believe that their employment turns upon subservience to union policies or membership obligations has traditionally been held to violate Sections 8 (a) (1) and (b) (1) (A) of the Act.

## III

The Board determined in the *Mountain Pacific* case, and that holding is equally valid here, that the parties to an exclusive hiring agreement might eliminate the illegality which otherwise attaches to such an agreement by providing therein that (1) selection of applicants for referral will not be affected by their union status or sympathies, (2) the employer retains the right to reject any applicant referred by the union, and (3) the provisions relating to the functioning of the hiring hall will be posted for the inspection of



applicants. Since the Board's finding of a violation with respect to the hiring hall rests upon the foreseeable effects such an agreement has in preventing employees from freely exercising their right to abstain from unionism, it was altogether proper for the Board to indicate the manner in which these effects could be dispelled. The protective clauses which the Board has specified assure applicants that their union affiliation will not affect their job opportunities, and lessen the control of the union over job opportunities—a factor which in large measure gives rise to the unlawful encouragement and restraint which otherwise flows from a union operated hiring hall.

The safeguard clauses do not represent an unwarranted intrusion into the substantive provisions of a collective bargaining agreement, as contended by the Union. They reflect, instead, an application of the statutory provisions to hiring agreements, delineating the lawful from the unlawful. In setting forth the safeguard clauses, the Board has followed a decisional method in conventional use, and peculiarly appropriate here, of indicating in its determination of unlawful conduct how the parties might have proceeded lawfully.

#### IV

Employee Slater was a victim of the unlawful hiring agreement in this case. His loss of employment resulted directly from the enforcement against him of the hiring hall contract. It is settled law that discrimination of this character violates the Act.



## ARGUMENT

- I. THE BOARD PROPERLY FOUND THAT THE HIRING AGREEMENT VIOLATED THOSE PROVISIONS OF THE ACT WHICH FORBID ENCOURAGEMENT OF UNION MEMBERSHIP BY DISCRIMINATION IN EMPLOYMENT

## A. INTRODUCTION

The central question on the merits is the validity of the Board's determination that a hiring agreement between an employer and a labor organization which vests the latter with exclusive control over the selection of applicants violates the Act, in the absence of adequate safeguards to assure job applicants that they will be referred without regard to their union membership. As stated *supra*, p. 6, the leading Board decision dealing with this question is *Mountain Pacific Chapter, Associated General Contractors, Inc., et al.*, 119 NLRB 883, 893, which the Board followed in this case.

In the *Mountain Pacific* case the Board comprehensively surveyed the relevant statutory considerations in the light of its administrative experience, and concluded that the existence of an unqualified hiring agreement of this character, standing alone and "apart from all other evidence in the case," fell within the statutory ban against discrimination in employment to encourage union membership. In the Board's view, such an arrangement was discriminatory because it afforded employment only to those employees who first cleared through the Union, and this, in turn, had the effect of encouraging employees and job applicants "towards compliance with obligations or supposed obligations of union membership,

and participation in union activities generally." 119 NLRB at 894, 895. The Board added, however, that inasmuch as the "vice in the \* \* \* [exclusive hiring arrangement] lies in the fact of unfettered union control over all hiring," the illegality of such an agreement could be cured if it explicitly provided that: (1) selection of applicants for referral to jobs shall be without regard to union membership requirements; (2) the employer shall retain the right to reject any applicant referred by the union; and (3) the parties shall post for the employees' inspection all provisions relating to hiring, including the foregoing provisions. 119 NLRB at 896, 897.

It may not be seriously questioned in the present case that the hiring agreement in effect between the Company and the Union did not satisfy the safeguard requirements which the Board has imposed in the *Mountain Pacific* decision, and that the holding in that case, if valid, would require affirmance of the Board's findings of violation in this case. Accord-

The Board's *Mountain Pacific* decision was subsequently denied enforcement by the Ninth Circuit (see pp. 46-47, *infra*), which remanded the case to the Board for a determination as to whether the hiring hall was in fact operated so as to prefer union members. The Board accepted the remand, and, finding evidence of such illegal preference, has issued a supplemental decision on that basis: *Mountain Pacific Chapter of the Associated General Contractors*, 127 NLRB No. 156, June 21, 1960, 46 LRRM 1200.

The agreement in this case does not contain any general guarantee against preferential treatment of union members for casual employment. It provides that those who have attained "seniority rating" shall be referred to jobs in accordance with such seniority, "irrespective of whether such employee is or is not a member of the Union" (R. 63). However, contrary to

ingly, decision in this case turns on the correctness of the Board's view that exclusive hiring agreements which do not conform with the *Mountain Pacific* standards violate the Act.

The Board's position has been accepted by the court below and by the First Circuit in *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583. It has been rejected by the Ninth and Sixth Circuits.\*

The Sections of the Act principally involved are 8(a)(3) and 8(b)(2), which deal specifically with

the Union's contention (Br. 17), this falls short of a general guarantee. Seniority rating is achieved only by "a minimum of three months service in the Industry," and there is no assurance that union members will not be preferred among those applicants who have not yet obtained, or who have lost and thus have to reacquire, seniority standing. Similarly inadequate is the no discrimination clause mentioned by the Union (Br. 47). This merely protects employees who are union members and not those who may wish to remain non-members.

As for the employer's right to reject, the Union suggests (Br. 46) that there was a practice in effect under which the Company rejected unsatisfactory applicants referred by the Union. But, no provision is made for this practice, if it exists, in the contract, and the Union does not contend otherwise.

Finally, it is not disputed that the posting requirement of the Board's *Mountain Pacific* decision—plainly the most important of the safeguards under the Board's theory (see *infra*, p. 57)—was not satisfied in this case.

\* *National Labor Relations Board v. Mountain Pacific Chapter of the Associated General Contractors*, 270 F. 2d 425 (C.A. 9); *National Labor Relations Board v. Hod Carriers*, decided February 5, 1960, 46 LRRM 2069 (C.A. 9), petition for certiorari pending, No. 75, this Term; *National Labor Relations Board v. E & B Brewing Company*, 276 F. 2d 594 (C.A. 6), petition for certiorari pending, No. 211, this Term. See also, *Morrison-Knudsen Company v. National Labor Relations Board*, 276 F. 2d 63 (C.A. 9).

unlawful practices respecting hire and tenure of employment. Section 8(b)(2) makes it an unfair labor practice for a labor organization to "cause or attempt to cause an employer to discriminate" in violation of Section 8(a)(3). The latter provision, in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The prerequisites to a finding that these Sections have been violated, then, are a showing that (1) there is discrimination respecting employment for which the employer and union are responsible, and (2) such discrimination encourages or discourages union membership. We now show that both these elements are present here.

**B. THE HIRING AGREEMENT IN THIS CASE PROVIDES FOR "DISCRIMINATION IN REGARD TO HIRE OR TENURE OF EMPLOYMENT" WITHIN THE MEANING OF SECTION 8(A)(3)**

The Union repeatedly asserts in its brief that "There was no discrimination [in this case]" (pp. 27, 25-28). Slater, however, was discharged from his job by the Company at the Union's demand, and the discharge was in full conformity with the provisions of the hiring agreement. The Union's contention that this discharge was not discriminatory, and that no discrimination results from contractual provisions calling for the discharge of an employee who obtains employment by himself rather than through the union hiring hall, is predicated on a reading of the statutory term "discrimination" to require a difference in treatment of an employee which is referable to his union

or non-union status. Pointing out that Slater "was a member of Local 357 in good standing," the Union concludes that "neither lack of union membership nor default in the discharge of an obligation of union membership could be \* \* \* the foundation for any action against Slater" (Br. 26). Similarly, pointing to the fact that the contract provides that seniority shall be the basis for referring casual employees who have acquired at least three months' service, the Union concludes that the dispatching service generally was not dependent on union membership (Br. 25-26). From this it follows, according to the Union, that there was no "discrimination" in this case, within the meaning of Section 8(a)(3) of the Act.

The Union misreads the statutory language. As shown *supra*, p. 17, Section 8(a)(3) imposes two requirements, the first pertaining to discrimination and the second to the kind of discrimination which is forbidden (that which encourages or discourages union membership). By reading the first requirement—discrimination in employment—to contemplate also that the discrimination be referable to unionism, the Union eliminates altogether the need for and meaning of the second requirement, which establishes the area of discriminatory conduct covered by the statute. But the divided structure of the provision, as well as the normal meaning of the term "discrimination,"

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\* The dictionary definition of "discriminate" does not support the Union's assumption that this term necessarily denotes an "invidious" quality (Br. 35). Webster's New International Dictionary Unabridged (Second Edition, 1939) defines "discriminate" as follows: "*Transitive*: 1. To serve to distinguish, to mark as different, to differentiate. *Now Rare*. 2. To sep-

show that the requirement of discrimination in employment is satisfied wherever there is a disparity of treatment between employees for purposes of securing or maintaining employment. Such disparity does not constitute a violation, however, until it is further shown that the difference in treatment encourages or discourages union membership. Thus, in the Board's view, the division of employees by the instant contract into those who are cleared for employment through the hiring hall and were thereby eligible to work, and those who are not so cleared and are thereby precluded from working, constitutes discrimination in employment within the meaning of Section 8(a)(3). If it can be shown that this discrimination encourages union membership, the violation is complete.

The difference between the Board and the Union as to the scope to be given the term "discrimination" is of critical importance in applying Section 8(a)(3) to union-operated hiring halls. By importing into the word "discrimination" the concept of differences "referable to union membership [or] an obligation of union membership" (Br. 28), the Union is enabled to argue that a violation of Section 8(a)(3) presupposes action taken against an employee because he is or is not a union member in good standing. And, since the basis for referral under the agreement here was seniority and not union membership, the Union can

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arate (like things) one from another in comprehension or use by discerning the minute differences. *Intransitive*: To make a distinction: to distinguish accurately \* \* \*. 2. To make a difference in treatment or favor (of one as compared with others) \* \* \*."



add that the Board's finding of violation may only be sustained on the theory that it is presumed that the union will nevertheless discriminate in favor of union members (Br. 34-38). On the other hand, if, as the Board submits, discrimination for purposes of Section 8(a)(3) requires only a showing of disparate treatment of employees in respect to securing or maintaining employment, the mere existence of the hiring arrangement here constitutes discrimination within the meaning of the Section; there is no need to presume that the union will discriminate. Moreover, it then becomes proper to inquire into the foreseeable effects of the exclusive hiring arrangement; for, even though such arrangement does not specifically make union membership a condition for referral, it may nonetheless tend to encourage union membership, within the meaning of the second part of Section 8(a)(3). In short, under the Board's view, the fact that the agreement here required the discharge of any employee who secured employment on his own establishes discrimination, so that the sole remaining question is whether this is the kind of discrimination which encourages union membership.<sup>10</sup>

<sup>10</sup> It has long been settled law in the circuits that the maintenance of a contract that provides for discrimination in employment which encourages union membership by itself violates Section 8(a)(3) and (b)(2) of the Act, whether or not it is enforced. See, e.g., *Red Star Express Lines v. National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board v. Philadelphia Iron Works*, 211 F. 2d 937, 941 (C.A. 3); *National Labor Relations Board v. Lummus Co.*, 210 F. 2d 377, 379-381 (C.A. 5); *National Labor Relations Board v. McGraw Co.*, 206 F. 2d 635, 641 (C.A. 6); *National Labor Relations Board v. Shuck Construction Co.*, 243 F. 2d 519,



The Board's interpretation of the term discrimination is the correct one. The Union's contrary interpretation, as we have shown, violates the general principle that a statute should, if possible, be construed so as to give effect to every word.<sup>11</sup> For, by limiting the term "discrimination" in Section 8(a)(3) to that referable to union membership or want of it, the Union has divested the separate encouragement or discouragement requirement of any meaningful purpose. In addition, the Union's reading fundamentally alters the statutory description of the kind of discrimination which Congress has outlawed. The language of Section 8(a)(3) does not restrict the term "discrimination," as the Union does, to action based on the employee's union membership, although it certainly includes such action. Instead, the language broadly proscribes discrimination in employment, irrespective of what it is based on, provided that it is intended to, or its foreseeable consequences are to, encourage or discourage union membership.

The Board's reading of "discrimination" in Section 8(a)(3) to mean only a difference in treatment of employees, with the term being given qualitative content by the descriptive phrase "to encourage or discourage membership in any labor organization," is supported, moreover, by this Court's analysis of that provision in *Radio Officers' Union v. National Labor*

521 (C.A. 9); cf. *National Labor Relations Board v. Revere Metal Art Co., Inc.*, 280 F. 2d 96 (C.A. 2), petition for certiorari pending, No. 412, this Term.

<sup>11</sup> See *United States v. Menasche*, 348 U.S. 528, 539, quoting from *Montclair v. Ramsdell*, 107 U.S. 147, 152.

*Relations Board*, 347 U.S. 17. Thus, the conclusion that the term "discrimination" standing alone does not comprehend a difference based on unionism, which without more would constitute a violation, is implicit in the Court's explanation that: (347 U.S. at 42-43):

\* \* \* [T]his section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

Similarly, the Court observed that discrimination was not contested there since "involuntary reduction of seniority, *refusal to hire for an available job*, and disparate wage treatment are clearly discriminatory." 347 U.S. at 39 (emphasis supplied). As here, the question in *Radio Officers* was whether such differences in the treatment of employees satisfied the remaining prerequisite to the finding of a violation, *i.e.*, encouragement of union membership (*ibid.*).<sup>12</sup>

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<sup>12</sup> To be sure, the reason for the disparate treatment in *Radio Officers* and the cases consolidated with it, was the employees' lack of union membership or lack of membership in good standing. However, this does not show, as the Union suggests (Br. 28), that discrimination in Section 8(a)(3) requires a differentiation based on union considerations, but merely that, where this is so, it becomes easier to infer that the discrimination had the foreseeable consequence of encouraging union membership.

It may also be noted that the conventional case of employer discrimination which has come before the Board involves the question of whether the employer has discriminated against an employee because of his union activities. Here, too, when the fact of discrimination is established, the inference of effect on union membership readily follows.

Mr. Justice Frankfurter's concurring opinion in *Radio Officers*, which he indicated was "not in disagreement" with the opinion of the Court, also reflects an understanding that the term "discrimination" connotes no more than "disparate treatment." The concurring opinion summarizes the "correct interpretation" of Section 8(a)(3) to be (347 U.S. at 55-56):

On the basis of the employer's disparate treatment of his employees standing alone, or as supplemented by evidence of the particular circumstances under which the employer acted, it is open for the Board to conclude that the conduct of the employer tends to encourage or discourage union membership, thereby establishing a violation of the statute.

Indeed, even the dissenting opinion in that case agrees in this respect. It states, "But the Section does not forbid all 'discrimination.' It carefully limits the conditions under which 'discrimination' is 'unfair.'" 347 U.S. at 57.

Finally, the Board's reading of the term discrimination in Section 8(a)(3)—to comprehend a difference in treatment which is not by itself unlawful or invidious—is not an unusual interpretation of such statutory language. Thus, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U.S.C. 13(a)), provides that it shall be unlawful "to discriminate in price between different purchasers of commodities of like grade and quality \* \* \* where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." In *Federal Trade Commission v.*

*Anheuser-Busch, Inc.*, 363 U.S. 536, it was urged that the mere showing of a price difference was not enough to establish discrimination within the meaning of Section 2(a), because discrimination necessarily connoted an unlawful intent, *i.e.*, an intent to eliminate competition and thereby obtain a monopoly. This Court rejected the contention concluding that (363 U.S. at 549): "there are no overtones of business buccaneering in the Section 2(a) phrase 'discriminate in price.' Rather, a price discrimination within the meaning of that provision is merely a price difference." The Court added (*id.*, at 550):

\* \* \* it is only by equating price discrimination with price differentiation that § 2(a) can be administered as Congress intended. As we read that provision, it proscribes price differences, subject to certain defined defenses, where the effect of the differences "may be substantially to lessen competition or tend to create a monopoly in any line of commerce \* \* \*." In other words, the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the nondirective phrase, "discriminate in price." \* \* \* [Footnotes omitted.]

So in the case of Section 8(a)(3) it would "derange" the statutory scheme "to read other conditions into \* \* \* the nondirective phrase" discrimination in regard to employment. The "statute itself spells out the conditions which make" a discrimination in employment "illegal or legal"—*i.e.*, when its purpose or

necessary effect is to encourage or discourage union membership.

For these reasons, we submit that the Union errs when it argues that the hiring agreement in the present case is not discriminatory because it "is expressly made to operate evenhandedly \* \* \*" (Br. 26). A discriminatory standard for obtaining employment does not become the less discriminatory because no exceptions are made in its uniform application. Accordingly, although it may be assumed with the Union that "the dispatching service \* \* \*" is open to all" (Br. 26), this does not alter the fact that those who do not follow its procedures are subject to discharge. As shown, this difference in treatment between employees who obtain jobs through the union hall and those who obtain them directly constitutes discrimination in employment within the meaning of Section 8(a)(3). We turn, then, to the remaining question under that Section—viz., whether the Board could validly find that the discrimination effected by the agreement encouraged union membership within the meaning of that provision.

C. THE BOARD WAS WARRANTED IN CONCLUDING THAT A HIRING AGREEMENT WHICH VESTS THE UNION WITH UNLIMITED POWER TO SELECT APPLICANTS FOR EMPLOYMENT HAS THE FORESEEABLE EFFECT OF ENCOURAGING UNION MEMBERSHIP WITHIN THE MEANING OF SECTION 8(3) (3) OF THE ACT

1. *The role of the Board and the courts in applying the statutory standard*

The determination of whether discrimination in employment is "to encourage or discourage membership in any labor organization"—within the meaning

of the second part of Section 8(a)(3)—calls for the Board to perform its function “in the empiric process of administration” of “translating into concreteness the purpose of safeguarding and encouraging the right of self-organization.” *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 193, 194. Unlike the term “discrimination,” the phrase “to encourage or discourage membership in any labor organization,” does not lend itself to a fixed or easily ascertainable meaning, at least in the outer reaches of its coverage. Congress there expressed, rather, a generalized injunction against conduct that would undermine the dominant policy of guaranteeing employees freedom to participate, or to refuse to participate, in union activities and organization. The task of particularizing the area in which this language would have its application was entrusted by Congress to the Board. As this Court has held (*Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 798):

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a “rigid scheme of remedies” is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. . . .



This holds equally true for the amended Act, which, insofar as here relevant, did not alter the generality of such provisions as Section 8(a)(3).

Indeed, the statutory language in question exemplifies the kind of economic regulation which Congress determined should be handled primarily through administrative agencies rather than through detailed legislation. Thus, Congress frequently has not gone beyond stating its policy objectives in broad terms with respect to legislation in complex areas of the modern industrial economy. It has thereby delegated, within the prescribed statutory limits, the function of detailed regulation to commissions and boards which have specialized experience in a particular field. "With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy." Landis, *The Administrative Process* (Yale, 1938), pp. 23-24. See also, Davis, *Administrative Law* (1958), Vol. I, pp. 34-44, esp. 37.

Against this background, it is clear that the Board's role in applying the phrase "to encourage or discourage membership in any labor organization" requires a focusing of its total experience upon the particular area of application—here the hiring hall—and full recourse to its understanding, from the many cases which have come before it, of the responses of



employees to pressures by employers and unions in the allocation between them of control over hiring and employment. "[T]he Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute." *National Labor Relations Board v. Atkins & Co.*, 331 U.S. 398, 403. "It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process." *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 209.

Accordingly, the Board, in concluding whether certain conduct is likely to encourage or discourage union membership, is not confined to the record of any single proceeding, nor is its finding invalidated because it may not be supported by evidence in the particular case that the activity involved actually had that effect or tendency. "'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 349. The "statutory plan for an adversary proceeding 'does not go beyond the necessity for the production of evidential facts \* \* \*, and compel evidence as to the results which may flow from such facts \* \* \* An admin-

istrative agency \* \* \* may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. \* \* \* " *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 48-49, quoting from *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 800.

In this area, the function of a reviewing court is thus limited to determining whether the agency has made "an allowable judgment." *Securities and Exchange Commission v. Chenery Corporation*, *supra*. "Calculating a cumulative effect on employees is not a job for this Court." *National Labor Relations Board v. Stowe Spinning Company*, 336 U.S. 226, 231. Since the Board's decision in this case rests upon such a calculation, its findings "carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488, quoted in *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 50, with regard to the application of the same statutory language involved in this case. See also, *National Labor Relations Board v. Atkins & Company*, 331 U.S. 398, 404; *National Labor Relations Board v. Hearst*, 322 U.S. 111, 131; *Siegal Company v. Federal Trade Commission*, 327 U.S. 608, 614; *Cardillo v. Liberty Mutual Company*, 330 U.S. 469, 470; *Gray v. Powell*, 314 U.S. 402, 411-412.<sup>13</sup>

<sup>13</sup> The Union's assertion that the Board's decisions in *Mountain Pacific* and this case represent an attempt to legislate (Br. 49-50), since the Act does not specifically outlaw or prescribe standards for hiring halls, is negated by the authori-

We shall show that the Board's judgment that, to vest the union with unlimited control over hiring, encourages union membership is reasonable and hence entitled to stand.

2. *The Board's experience with arrangements which give unions exclusive control over hiring*

As described in the Union's brief (pp. 17-23) and in the Board's *Mountain Pacific* decision (119 NLRB 883, 896), the hiring hall has flourished in industries where employment has been sporadic, mobile, intermittent and casual—in industries like maritime, building and construction, and trucking. The casual employment to which the agreement here is applicable is a case in point. In such industries, the employer finds it convenient to depend upon the union for a supply of

ties cited in the text above. Its further contention that the House Conference Report relating to the 1947 amendments shows an intent to reduce the Board's authority "to exercise its 'expertise'" and to draw inferences (Br. 39, 38-40), is wholly erroneous. It was after reviewing the statements in the Conference Report relied on by the Union that this Court, in *Universal Camera v. National Labor Relations Board*, 340 U.S. 476, 488, stated that the amendments were "[not] intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." See also, *Id.* at 486; n. 22. Moreover, the Court reaffirmed this conclusion in *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 49-50. Finally, to the extent that the Union's contention in this respect is addressed to the supposition that the Board has rested its finding of a violation on the presumption that the Union will prefer members in its administration of the hiring hall, the contention misconceives the Board's reasoning (see pp. 19-20, 40-42).

manpower for jobs of a limited duration. And in turn, the union has served, in large measure, to provide employees with job security, job control, seniority and other protections which would not otherwise be readily attained in such industries. S. Rep. 986, pt. 5, 80th Cong., 2d Sess., pp. 38-39, 50, 59. It is not surprising in these circumstances that the hiring hall developed hand-in-hand with closed shop practices, i.e., arrangements which limited employers to the hiring of union members.<sup>14</sup> Congress was fully aware, at the time of the 1947 amendments to the Act, of this link between the hiring hall and the closed shop. As Senator Taft stated on the floor of the Senate (93 Cong. Rec. 3836, II Leg. Hist. 1010):<sup>15</sup>

Perhaps [the closed shop] is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them \* \* \* Such an arrangement gives the union tremendous power over the employees; furthermore, it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field.

<sup>14</sup> See, e.g., Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (U. Mich., 1956), pp. 62, 64, 71; Bertram and Maisel, *Industrial Relations in the Construction Industry* (U. Calif., 1955), pp. 37-38, 45-47; Joint Comm. Rep. 986, 80th Cong., 2d Sess. Part 1, p. 25.

<sup>15</sup> "Leg. Hist." denotes the two volume work *Legislative History of the Labor Management Relations Act, 1947* (Gov't Print. Off., 1948). In addition to Senator Taft's statement quoted in the text, see S. Rep. 105, 80th Cong., 1st Sess., p. 6, I-Leg. Hist. 412; 93 Cong. Rec. 4885, II Leg. Hist. 1420.

Congress in 1947 did not specifically outlaw the hiring hall, but sought to deal with its abuses by limiting permissible union-security arrangements to a qualified form of union shop and continuing the Board's broad power to proscribe any other form of discrimination in employment which was designed to, or necessarily tended to, encourage union membership. However, closed shop practices have continued to exist in situations where unions controlled the dispatch or clearance of applicants for employment. Thus, an impartial study of hiring practices in the building trades several years after the passage of the 1947 amendments disclosed that (Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (U. Mich., 1956), p. 71):

\* \* \* employment arrangements equivalent to those under a closed shop [have remained] in effect. Membership in the union was almost universally regarded as a prerequisite for obtaining employment; in most instances, men were employed directly or indirectly through the union itself. Both [employers and unions] viewed this as standard practice and showed little concern for the illegality of the arrangement.

Available evidence indicates that this statement is also applicable to the administration of hiring halls in other industries, under the 1947 amendments.<sup>19</sup>

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<sup>19</sup> See Sheldon, *Union Security and the Taft-Hartley Act in the Buffalo Area*, New York School of Industrial Relations Research Bulletin No. 4, p. 41 (1949); Pierson, *Effects of the Taft-Hartley Act on Labor Relations in Southern California*, Proceedings of the 23rd Annual Conference of the Pacific Coast

In consequence, the Board, in the cases which have come before it since 1947, has had a continuing opportunity to observe and study the nature of the hiring hall and allied arrangements. Indeed, one of the most frequent types of Section 8(b)(2) violation—i.e., where a union has caused or attempted to cause an employer to discriminate in violation of Section 8(a) (3)—which the Board has found in this period has occurred in the context of an exclusive hiring arrangement.<sup>17</sup> Hence, when the *Mountain Pacific* case came before it in 1957, the Board had acquired an intimate familiarity with the operation of exclusive hiring arrangements, and was fully aware of the fact that

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Economic Association (1949), p. 78; Craig, *Hiring Hall Arrangements and Practices*, 9 Labor Law Journal (C.C.H., 1958), 939, 942; *Labor-Management Relations in Illini City*, University of Illinois, 1953, Institute of Labor & Industrial Relations (U. of Ill., 1953), Vol. I, pp. 646-647, 749, 773, Vol. II, pp. 148-149.

Congressional hearings and committee reports subsequent to 1947 have similarly evidenced the existence of widespread circumvention of the ban against the closed shop in the operation of hiring halls, particularly those in the maritime industry. See, e.g., Hearings before Senate Subcommittee on Labor-Management Relations, 81st Cong., 2d Sess., *Hiring Halls in the Maritime Industry*, pp. 7, 13, 62, 87, 184, 198, 213, 318; S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 6-7; Hearings before Subcommittee on Labor and Labor Management Relations, 82nd Cong., 1st Sess., on S. 1044, *A Bill to Legalize Maritime Hiring Halls*, pp. 70-71, 82, 88, 91.

<sup>17</sup> In the Appendix to this brief, *infra*, pp. 63-66, we list forty-four decisions of this kind taken from the Board's published reports. This list, which does not purport to be a complete one, illustrates the nature of the Board's experience with hiring arrangements. Many other meritorious cases of this type were disposed of prior to formal Board adjudication.



preferential treatment of union members was a frequent, if not predominant, feature of the administration of such arrangements. It was against this background that the Board approached the question of whether an unqualified hiring agreement, standing alone and not containing any assurance to employees that their opportunities for employment would be unaffected by their union affiliation, would have the foreseeable effect of encouraging union membership.

### 3. *The reasonableness of the Board's determination*

This Court has stated that the touchstone for the proper application of the statutory prohibition against unlawful encouragement of union membership is "[t]he policy of the Act \* \* \* to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 40. The "encouragement" which is prohibited accordingly is that which transgresses this policy, *i.e.*, encouragement resulting from differences in treatment in employment which does not leave employees free to make a choice with respect to union membership.

The *Radio Officers'* decision also makes clear that the term "membership" is not restricted to, although it includes, enrolled union membership. That is, it is not a prerequisite to a violation of Section 8(a)(3) that the activity in question be specifically designed to encourage an employee to sign up as a union mem-



ber, or to retain his membership. Rather, "membership" embraces generally participation in "union activities," and adherence to union principles in order to "stay in good standing in a union." 347 U.S. at 40, 42. Encouragement to attend union meetings, join picket lines, observe union hiring policies, etc., all constitute encouragement of union membership within the meaning of the Act. Accordingly, the hiring hall agreement in this case falls afoul of Section 8(a)(3) if the Board could reasonably conclude that its existence and operation exerted a pressure upon applicants which did not leave them free to decline either to become a union member, to "join in \* \* \* union activities," or to comply "with union obligations or practices." 347 U.S. at 42, 52.

The character of the unlawful encouragement which inheres in unqualified control by a union over hiring has been summarized by the Court of Appeals for the First Circuit in approving the Board's views expressed in the *Mountain Pacific* decision (*National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 585):

In our opinion the Board could well conclude that an applicant who must be "cleared" for a job by a union hiring hall will fear that his opportunity of selection will be small if he does not become a union member, in view of the widely-accepted belief (often encouraged by unions themselves) that hiring halls do operate in a discriminatory manner, and in view of the difficulties facing the applicant if he chooses to enforce his rights (well illustrated in the

factual situation in the *Mountain Pacific* case itself). The Board might further conclude that this apprehension would be materially lessened if there were posted at the hiring hall a notice outlining the exact, non-discriminatory methods by which selection would be made. \* \* \*

The Board in its *Mountain Pacific* decision has amplified this explanation of the manner in which a union-controlled hiring arrangement exerts pressure upon employees to forego their rights to remain unaffiliated, as follows (119 NLRB 883, 895-896): \*

From the standpoint of the working force generally—those who, for all practical purposes, can obtain jobs only through the grace of the Union or its officials—it is difficult to conceive of anything that would encourage their subservience to union activity, whatever its form, more than this kind of hiring hall arrangement. Faced with this hiring hall contract, applicants for employment may not ask themselves what skills, experiences or virtues are likely to win them jobs at the hands of AGC contracting companies. Instead their concern is, and must be: What, about themselves, will probably please the Unions or their agents? How can they conduct themselves best to conform with such rules and policies as Unions are likely to enforce? In short, how to ingratiate themselves with the Union, regardless of what the Employer's desires or needs might be.

\* \* \* \* \*

Here the very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over

the employment status. Here all that appears is unilateral union determination and subservient employer action with no aboveboard explanation as to the reason for it, and it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty in some other respect. The Employers here have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. From the final authority over hiring vested in the Respondent Union by the three AGC chapters, the inference of encouragement of union membership is inescapable. [Footnotes omitted.]<sup>18</sup>

Encouragement of applicants to comply with union policy and practices, moreover, does not come alone from the union's unfettered and unilateral control over hiring. Applicants wishing to utilize the hiring hall may not realistically be expected to view its operation divorced from their understanding of and experience with hiring halls as they have traditionally operated. To the job seeker, an arrangement vesting plenary authority in a union to supply men for jobs constitutes a hiring hall in the manner that he has known such halls customarily to exist and operate, at least in the absence of reliable safeguards to the contrary. As we have shown, *supra*, pp. 30-34, power in a union to select applicants for jobs originally developed as a

<sup>18</sup> See also, the Board's restatement of its reasoning in the supplemental decision upon remand from the Ninth Circuit in the *Mountain Pacific* case, quoted in n. 21, p. 41, *infra*.

concomitant to the closed shop in industries characterized by casual employment, and the preferential features of such hiring arrangements have not been substantially eliminated by the invalidation of the closed shop in 1947. From the standpoint of the applicant, then, an unqualified hiring hall arrangement could well carry the meaning that union membership was prerequisite to referral, or, at the very least, that full compliance with all requirements and policies of the union was expected if he was to be dispatched on an equal footing with union members. This analysis of the meaning and effect of hiring arrangements like that in the present case, which the Board is specially equipped to make by virtue of its experience in the field (*supra*, pp. 25-30), plainly supports the conclusion that job applicants are not free, in the absence of reliable assurance to the contrary, to refrain from unionism where their employment opportunities depend upon referral from a union-controlled hiring hall.

The Board's conclusion that union membership is encouraged by requiring an employee to resort to a union-controlled hiring hall to get a job is fully consistent with and supported by this Court's holding in the *Radio Officers'* case respecting the discrimination against employee Fowler. Similar to the situation here, the union in that case caused the discharge of Fowler because he had obtained a job by himself without clearance from the union hiring hall. The Court agreed with the Board that the "union in causing the employer to discriminate against Fowler by denying him employment in order to coerce Fowler into fol-

lowing the union's desired hiring practices deprived Fowler of a protected right" and thereby unlawfully encouraged him "to remain in good standing in [the] union". 347 U.S. at 42.<sup>19</sup>

The Union would distinguish the *Radio Officers'* situation on the ground that the requirement in that case of obtaining employment through the union hiring hall was "a membership rule," whereas in the present case the requirement was embodied in the terms of a contract (Br. 26, 28). This factual difference, however, is not necessarily relevant to the question of whether a compulsory hiring procedure encourages union membership within the meaning of Section 8(a)(3). That question is to be resolved, as we have shown, in terms of the nature of the hiring procedure and its foreseeable effect on employees, not upon the happenstance of whether the hiring procedure is contained in union rules or in a contract. Thus, it has long been settled that a union membership obligation which exceeds the permissible statutory limits does not escape the ban against encouragement of union membership if it happens to be embodied in a collective bargaining agreement. See

<sup>19</sup> The holding in *Radio Officers'* also negates the Union's assertion (Br. 27-28) that the hiring agreement in this case does not show a "purpose" to encourage union membership. As the Court ruled in that case, an "intent to encourage is sufficiently established" by showing that encouragement is a "natural consequence" of the conduct in question. The conduct in this case is identical for present purposes with that in *Radio Officers'*, i.e., the imposition of a requirement that applicants follow "the union's desired hiring practices" in order to obtain employment. 347 U.S. at 42, 45. If the purpose to encourage is inferable in the one case, it is also inferable in the other.

cases cited at n. 10, *supra*. In short, the question is not where the requirement for acquiring or retaining employment is expressed—in a contract or in union bylaws or rules—but whether it is of a character that may reasonably deprive applicants and employees of full freedom in the exercise of their right to refrain from union activities, policies, and membership. Accordingly, the same considerations which warranted the conclusion in *Radio Officers*, that to precondition employment upon “following the union’s desired hiring practices” (347 U.S. at 42) was unlawfully to encourage union membership, are also operative with respect to the identical hiring procedures which were required by contract in the present case.<sup>20</sup>

For these reasons, as well as those set forth pp. 17-20 *supra*, the Union misconceives the basis of the Board’s *Mountain Pacific* decision when it asserts that the inference drawn by the Board from the existence of a union-controlled hiring procedure is “that the union

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<sup>20</sup> *National Labor Relations Board v. Furriers Joint Council*, 224 F. 2d 78 (C.A. 2), relied on by the Union (Br. 26, 28), is not to the contrary. The Court of Appeals in that case premised its decision that the Act did not proscribe coercion directed at employees who violated the terms of a collective bargaining agreement on the assumption that the contractual provision involved—a restriction on overtime work—was valid. 224 F. 2d at 80. There is no suggestion in either that case or in *National Labor Relations Board v. Rockaway News Supply Company*, 345 U.S. 71, 80, also cited by the Union (Br. 26), that a union requirement which is independently invalid under the Act sheds its amenability to correction by incorporation into a contract. And the question of whether an agreement is independently invalid—the issue in this case—is scarcely controlled by holdings that enforcement of an admittedly valid agreement is not an unfair labor practice.



will exercise its authority discriminatorily by denying referral to employees because of nonmembership or default "in the performance of a membership obligation" (Br. 34). The Board has entertained no such presumption of preferential treatment of union members. As stated in the *Mountain Pacific* decision, the violation which results from conditioning employment upon clearance or dispatch by a union, without adequate assurances that nonmembers will be treated on an equal basis with members, is that such a procedure "apart from all other evidence \* \* \* encourages [employees'] subservience to union activity" (119 NLRB at 894-895).<sup>21</sup> That is, the hiring arrangement itself effects a discrimination in employment; the Board has merely inferred that the foreseeable effect of such discrimination is to encourage union membership. Accordingly, the present case involves no presumption that the Union will illegally prefer union members in the operation of the hiring hall. See *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 585 (C.A. 1). Nor, on the other hand, does the Board's determination merely "condemn the union on the basis of an employee's belief" that such preference might be given (Br. 36).

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<sup>21</sup> Similarly, the Board has reiterated, in its decision upon the remand in *Mountain Pacific*, that "the vice in [an unqualified exclusive hiring arrangement] lies in the fact that \* \* \* employees whose job opportunities are controlled exclusively by the union will fear, and reasonably so, that union membership or lack of it will be a factor in obtaining referral by the union \* \* \* [and that] therefore, the employees will be encouraged to become or remain members of the union" (127 NLRB No. 156, 46 LRRM 1200).



It is the execution and maintenance of the hiring agreement—the Union's and the Company's own act—that constitutes the violation. If, in the realities of industrial life, it can fairly be said that the foreseeable consequence of such a contract is, as we have shown, to encourage union membership, the Union and the Company cannot escape these consequences of their contract by a claim that employees should not respond as they do to the procedures provided therein. Indeed, this is the precise holding of the Court in *Radio Officers'* with respect to the role of motive in the interpretation of Section 8(a)(3). 347 U.S. at 42-48.

The Union further contends that the Board's conclusion that a union hiring hall inherently encourages union membership requires also the conclusion that "any service [a union] well performs will 'inherently' encourage union membership," including all of its ordinary functions as representative of employees (Br. 34-35). This may be so, but it does not follow that a union thereby violates the Act. Section 8(a)(3) of the Act "does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited." *Radio Officers'*, 347 U.S. at 42-43. It is not until the union or the employer makes a difference in treatment with respect to hire or employment that the inquiry as to whether such difference encourage membership becomes relevant. The factual situation in *National Labor Relations Board v. Gaynor News Company*, one of the three cases treated in the decision in *Radio Officers'*, illustrates the point. In *Gaynor*

the agreement between the employer and the union, which was the representative of both union and non-union employees, provided a wage increase for only the union employees. A general wage increase obtained by the union, of course, would have been completely lawful, however much it might have encouraged union membership. The contract in *Gaynor*, though, was found to violate Section 8(a)(3) for a difference was made among the employees as to the distribution of the benefits. That is, the encouragement of union membership inherent in a wage increase was shown to be accomplished by "discrimination," within the meaning of the first part of the statutory prohibition.<sup>22</sup>

<sup>22</sup> We do not suggest that every discrimination in employment constitutes a statutory violation if it has any possible effect, however slight, of encouraging union membership within the meaning of Section 8(a)(3). Some minimal encouragement of union membership, within a literal meaning of that phrase, may remain from the mere fact that employees must apply for jobs through a union even if the guarantees prescribed by the Board are present (see *infra*, pp. 51-60). As the Board observed in its *Mountain Pacific* decision, however, not every literal form of encouragement requires a finding of a violation (119 NLRB at 897-898). Other statutory provisions and objectives which must be taken into account would preclude pushing any one provision to its extreme as a matter of abstract logic. It "is the entire Act, and not merely one portion of it, which embodies the definitive statement of national policy." *Local Lodge 1424, I.A.M. v. National Labor Relations Board*, 362 U.S. 411, n. 7 at 418. See also the cases cited *infra*, p. 57, and n. 32, *infra*. As we show *infra*, pp. 51-60, a union-operated hiring hall containing the safeguards specified by the Board represents a reasonable adjustment between the statutory objective of a free exercise of employee rights and that of encouraging agreement between employer and union as to such matters as hiring procedures. Viewed in this light, the Union's

In sum, the encouragement of union membership which the statute forbids is established in this case by the foreseeable effects which the Board could properly conclude that an exclusive hiring agreement has upon job applicants and employees. The Union's contentions to the contrary are in the main grounded upon its implicit insistence that the phrase "to encourage or discourage membership in any labor organization" be read out of Section 8(a)(3) (see pp. 18-19, 21, *supra*). Properly construed, this provision presents none of the difficulties which the Union would attach to the Board's determination here and in *Mountain Pacific*.<sup>23</sup>

assertion (Br. 35) that the Board's reasoning would require it to find a violation where an employer retains exclusive control over hiring, on the ground that such control would operate to discourage union membership, cannot be treated as a serious contention. Whatever might be said as to the discouragement effects of a particular method of hiring by a given employer, it is plain that there is no evidence warranting a conclusion that employee freedom to organize is unduly discouraged by the mere fact that an applicant is required to ask an employer for a job. The Board's conclusion respecting the union-operated hiring hall, on the other hand, rests upon cogent evidence of the link between the closed shop and the hiring hall, and of the peculiar pressures to which applicants are subject in this specialized system of hiring.

<sup>23</sup> The validity of the Board's ruling here and in *Mountain Pacific* is not affected by Section 8(f) of the Act, which was enacted in 1959, subsequent to the *Mountain Pacific* decision. Section 8(f) pertains only to agreements in the building and construction industry, and provides, *inter alia*, that pre-hire agreements are not unlawful even though they establish a referral system of hiring and specify objective qualifications for priority in referral. Quite apart from the fact that the building and construction industry is not involved in this case, the House Conference Report states flatly that "Nothing in such

## D. RELEVANT DECISIONS OF THE COURTS OF APPEALS

The legality of exclusive hiring halls under the Act was not comprehensively treated by the Board in its decisions prior to the *Mountain Pacific* case.<sup>24</sup> In the interval following that decision four circuits have had occasion to pass on the validity of the Board's determination. As noted p. 16 *supra*, the court below and the First Circuit have approved the ruling, and the Courts of Appeals for the Sixth and Ninth Circuits have declined to enforce Board orders in cases in-

provision is intended to restrict the applicability of the hiring hall provisions enunciated in the *Mountain Pacific* case \* \* \*." H. Conf. Rep. 1147, 86th Cong., 1st Sess., p. 42. As the First Circuit has pointed out, moreover, "The amendment is in no way inconsistent with the Board's rule, and in fact affirmative Congressional approval might be inferred from the statement in the Conference Report \* \* \*." *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 586, n. 4.

<sup>24</sup> In the majority of cases involving a hiring hall, decision of the Board rested on the existence of preferential treatment of union members. See the cases collected in the Appendix, *infra*, pp. 63-66. The dicta relating to the effect of an exclusive hiring arrangement, standing alope, do not reflect an altogether consistent position in the early cases. Compare *Hunkin-Conkey Construction Company*, 95 NLRB 433, 435, with *The Lummus Company*, 101 NLRB 1628, 1631, n. 8. Of pertinence here, perhaps, is the observation of this Court that "in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations, language may have been used or views implied which do not completely harmonize \* \* \*." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241.

volving exclusive hiring agreements.<sup>25</sup> The considerations advanced in the adverse decisions do not, we submit, impair the validity of the foregoing analysis.

The Sixth Circuit decision, *National Labor Relations Board v. E & B Brewing Company*, 276 F. 2d 594, appears to rest, not on an evaluation of the Board's *Mountain Pacific* decision, but on procedural grounds not raised by the Union in the present case.<sup>26</sup> The Ninth Circuit met the problem directly in *National Labor Relations Board v. Mountain Pacific Chapter of the Associated General Contractors, Inc.*, 270 F. 2d 425, holding, contrary to the Board, that a hiring hall cannot give rise to a violation of the Act unless there is in fact preference given to union members in job referrals, or unless the parties intend that it shall so operate (*Id.*, at 429-431). However, the court acknowledged (at p. 432) that the Board could draw an inference of an intent to prefer from the

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<sup>25</sup> The Union errs in stating that the Court of Appeals for the Second Circuit has rejected the Board's holding in *Mountain Pacific* (Br. 32). In each of the two cases cited by the Union the Second Circuit expressly reserved decision as to the validity of the Board's position. *Morrison-Knudsen Company v. National Labor Relations Board*, 275 F. 2d 914, 917, petition for certiorari pending on another issue, No. 120, this Term; *National Labor Relations Board v. News Syndicate Company*, 279 F. 2d 323, 330, petition for certiorari pending on another issue, No. 339, this Term.

<sup>26</sup> The Sixth Circuit held first, that the record in the case before it did not present the validity of the hiring agreement for determination, and second, that the Board's application of its *Mountain Pacific* ruling in that case constituted an improper retroactive "change of rules." We have set forth our reasons for believing that these grounds are insubstantial in our petition for certiorari in that case, No. 211, this Term, pp. 11-13.

failure to include protective clauses in the contract, but "such a rule of evidence should operate prospectively, since the burden is thereby shifted." That is, since the parties in *Mountain Pacific* itself were not afforded an opportunity to rebut that inference, the absence of those clauses could not, in the Court's view, be used to establish an illegal intent in that case.

The holding of the Ninth Circuit appears to rest, as the First Circuit has suggested in *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 585, on a premise which we have shown to be erroneous, viz., that the Board's position is that the existence of the hiring hall gives rise to a presumption that the union will prefer union members. As the First Circuit correctly notes, however, the Board's view is simply that, without the protective clauses (276 F. 2d at 585-586):

\* \* \* an exclusive hiring hall constitutes undue encouragement of union membership. This inference would not be rebuttable by proof that the union's operation of the hall involved no discrimination in fact. \* \* \* This was not a shifting of the burden of proof. It was simply a modification of the Board's views, in the continuing development of its expertise, as to undue encouragement. If this determination of the Board was retroactive it was no more so than whenever a court of law decides, on further consideration, to modify earlier views. \* \* \*

Nor is the Board's position here weakened by the fact that, before issuance of the Board's *Mountain*



*Pacific* decision, a number of Courts of Appeals had expressed the view, usually by way of dicta, that a hiring arrangement which vested a union with the right to refer job applicants did not of itself violate the Act. The statement of the Eighth Circuit is typical: "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Company v. National Labor Relations Board*, 196 F. 2d 841, 845.<sup>27</sup> These statements were made without the benefit of a record which squarely presented and narrowed the issue, and the light shed thereon by the Board in its *Mountain Pacific* decision. It is significant that the First Circuit had expressed the view, before it was directly presented with the *Mountain Pacific* issue, that "It is not illegal for an employer to rely upon a union to provide it with employees." *National Labor Relations Board v. International Association of Heat and Frost Insulators*, 261 F. 2d 347, 350. That court, nonetheless, unanimously approved the Board's *Mountain Pacific* holding that an exclusive arrangement of this character is invalid where no assurances are given to employees that membership

<sup>27</sup> See also, *Eichleay v. National Labor Relations Board*, 206 F. 2d 799, 803 (C.A. 3); *National Labor Relations Board v. Philadelphia Iron Works*, 211 F. 2d 937, 943 (C.A. 3); *National Labor Relations Board v. McGraw Co.*, 206 F. 2d 635, 640 (C.A. 6); *National Labor Relations Board v. Swinerton*, 202 F. 2d 511, 514 (C.A. 9), certiorari denied, 346 U.S. 814; *National Labor Relations Board v. Local 10, International Longshoremen's and Warehousemen's Union*, 214 F. 2d 778, 781 (C.A. 9); *National Labor Relations Board v. Thomas Rigging Company*, 211 F. 2d 153, 157 (C.A. 9), certiorari denied, 348 U.S. 871.



or adhere to union policies is not a prerequisite of referral. *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583. As the court recognized, the Board may appropriately modify its views or adopt new approaches to problems of this kind "in the continuing development of its expertise". 276 F. 2d at 586.<sup>28</sup>

## II. THE HIRING AGREEMENT IN THIS CASE INDEPENDENTLY VIOLATED SECTIONS 8(a)(1), AND 8(b)(1)(A) OF THE ACT

Sections 8(a)(1) and 8(b)(1)(A) of the Act prohibit an employer and union, respectively, from restraining or coercing employees "in the exercise of the rights guaranteed in Section 7". The latter Section in turn provides, in material part, that employees have the right "to form, join, or assist labor organizations \* \* \* and to engage in other concerted activities \* \* \* and \* \* \* to refrain from any or all such activities \* \* \*". These provisions, which the Board also found to have been violated by the maintenance of the hiring agreement in this case (R. 36), differ from Sections 8(a)(3) and 8(b)(2) in that they do

<sup>28</sup> It may also be noted that the early statements may be fully consistent with the Board's present position to the extent that they relate to nonexclusive hiring agreements with unions, i.e., agreements whereby the union-controlled hiring hall is one, but not the exclusive, means by which an applicant may obtain a job. If an applicant has alternative ways of securing employment, it scarcely may be said either that the arrangement discriminates against him, or that it restrains his freedom of choice respecting unionism. *National Labor Relations Board v. Brotherhood of Painters*, 242 F. 2d 477 (C.A. 10); *Miami Valley Carpenters District Council, and Bowling's Supply and Service, Inc.*, 127 NLRB No. 136, June 10, 1960.

not depend on a showing of discrimination in hiring or encouragement of union membership. All that is required to sustain a violation of the provisions now under consideration is that the hiring agreement had a reasonable tendency to restrain or coerce employees in their right "to refrain" from assisting unions or engaging in union activities.

That the hiring agreement in this cases had this prohibited effect is established by the same considerations which show that applicants and employees subject to it are unlawfully encouraged to become union members. Thus, as we have shown, the Board could reasonably conclude that job applicants who must obtain employment through the Union's hiring procedures are deprived of any meaningful freedom to ignore union rules and policies, at least in the absence of adequate assurances of fair treatment for the non-union applicant. It is the singular purpose, however, of Sections 8(a)(1) and (b)(1)(A) to protect employees in the exercise of their right to support or refrain from unionism against undue pressures by employers and unions. Conduct which has the effect of adversely threatening employment opportunities traditionally has been regarded as constituting "restraint and coercion" within the meaning of these provisions. See, e.g., *National Labor Relations Board v. Electric Vacuum Cleaner Company*, 315 U.S. 685, 692-693; *National Labor Relations Board v. Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 625 (C.A. 2); *National Labor Relations Board v. Local 404, Teamsters*, 205 F. 2d 99, 101-102, D. 2 (C.A. 1); *National Labor Relations Board v. Local 55, United Brother-*

hood of Carpenters, 205 F. 2d 515, 516 (C.A. 10). And where, as here, such restraint is brought to bear in connection with the Section 7 right to refrain from supporting union policies or joining a union, the violation is established. See in addition to the cases cited above, *National Labor Relations Board v. Philadelphia Iron Works*, 211 F. 2d 937, 943-944 (C.A. 3); *National Labor Relations Board v. Local 1423, Carpenters' Union*, 238 F. 2d 832, 837 (C.A. 5). In short, the pressures inherent in an unqualified union-controlled hiring procedure which tend to inhibit a full exercise of Section 7 rights by job applicants bring the present hiring agreement directly within the proscriptions of Sections 8(a)(1) and 8(b)(1)(A) of the Act.

### III. THE BOARD COULD VALIDLY DETERMINE THAT THE ILLEGALITY OF AN AGREEMENT WHICH VESTS EXCLUSIVE HIRING AUTHORITY IN A UNION MAY BE OVERCOME BY INCLUSION IN THE AGREEMENT OF THE PROTECTIVE CLAUSES SPECIFIED BY IT

As we have shown, the Board's *Mountain Pacific* holding, which was applied in this case, rests on the theory that an agreement which unqualifiedly vests a union with exclusive power to select job applicants unduly deters employees subject to the agreement from exercising their statutory right to abstain from unionism. Under this reasoning, it would follow that, if the parties to the agreement were to take appropriate steps to eliminate or neutralize the improper effects on applicants of their hiring procedures, the illegality in an exclusive hiring arrangement would be eliminated. Accordingly, the Board in its *Moun-*

*tain Pacific* decision made clear that its interpretation and application of the relevant statutory provisions in that case did not necessarily outlaw all hiring agreements.<sup>29</sup> Indeed, the overall impact of the *Mountain Pacific* decision has not been, and was not intended to be, destructive of the hiring hall as an institution, but to hedge its operation to the extent necessary to make it compatible with the free exercise of employee rights guaranteed by the Act.<sup>30</sup>

In short, since, in the Board's view, the "vice in the \* \* \* [exclusive] hiring hall lies in the fact of unfettered union control over all hiring" (119 NLRB at 896), the Board has also undertaken to specify the means for overcoming the unlawful aspects of such arrangements, *i.e.*, the means for reducing the union's control and assuring employees that referral would

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<sup>29</sup> Compare the statement of Senator Taft in S. Rep. 1827, 81st Cong., 2d Sess., p. 14 (Un. Br. 23-24): "The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them \* \* \*. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union."

<sup>30</sup> The Board in reaching its conclusion in the *Mountain Pacific* case was fully aware of the useful and important function performed by hiring halls in many industries. As it stated (119 NLRB at 896, n. 8): "It was to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants."

not turn upon their union affiliation or support. Thus, the Board indicated in the *Mountain Pacific* decision (119 NLRB at 897).

that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated \* \* \* only if the agreement explicitly provided that:

(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

The Board also noted that "The basis for a union's referral of one individual and refusal to refer another may be any selective standard or criterion which an employer could lawfully utilize in selecting from among job seekers" (*ibid.*).

The appropriateness of these protective clauses for safeguarding employee rights is plain. Satisfaction of the first requirement—that the agreement provide for selection of job applicants without reference to union considerations—serves to disabuse the em-

ployees of any fear that they must please the union to obtain employment. This minimal step in no way interferes with the legitimate functioning of a hiring hall. The Union's suggestion (Br. 45) that such a clause serves no purpose, because it will not deter unions bent on preferring their members for jobs from doing so, has relevancy only upon the assumption, which we have shown to be erroneous (*supra*, pp. 19, 20, 40-42), that the illegality to which the safeguard clauses are addressed is the unions' presumed propensity to administer hiring halls to the advantage of their members. These clauses are not designed to prevent preferential treatment of union members; rather, they are designed to overcome the unlawful encouragement to union membership which the exclusive hiring hall necessarily exerts upon job applicants. The obvious first step in this direction is to assure applicants that referrals will not be made on the basis of union membership considerations.

The second requirement—that the employer be given the right to reject referred applicants—lessens the control of the union over the hiring function and thereby tends to eliminate any fear of job applicants that the union will act arbitrarily or preferentially. Moreover, if the employer can reject any person referred by the union hiring hall, employees are put on notice that their qualifications are likely to be determinative of their success in securing work, rather than conformity "with such rules and policies as unions are



likely to enforce" (119 NLRB at 895).<sup>31</sup> The Union argues, however, that this requirement is futile because the employer's right to reject would not be exercised until too late to prevent any unlawful preference of union members in the referral process, and adds that in any event the record shows in the present case that employers as a matter of practice exercised a right of rejection under the agreement in this case (Br. 45-46). As to the first point, the Union again wrongly assumes that the purpose of the safeguard clauses is to prevent actual preference of union members in the operation of a hiring hall. We have shown, however, that their purpose is to lessen the encouragement which would otherwise flow from unfettered union control; giving the employer the right to reject assures all employees that, even if a union employee is preferred, the employer need not accept him if he is unqualified or the employer does not desire to acquiesce in the illegal preference, thereby leaving the job open for a qualified employee regardless of union affiliation. As to the Union's second point, there is no

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<sup>31</sup> Compare the statement in the Senate Report relating to the Senate's 1947 proposals for outlawing the closed shop (S. Rep. 105, 80th Cong., 1st Sess., p. 6, I Leg. Hist. 412):

"[The hiring hall] not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires."

See also, the statement of Senator Taft on the floor of the Senate during consideration of the 1947 amendments (93 Cong. Rec. 3836, II Leg. Hist. 1010):

"If in a few rare cases the employer wants to use the union as an employment agency, he may do so; there is nothing to prohibit his doing so. But he cannot make a contract in advance that he will only take the men recommended by the union."



question that the alleged practice of permitting employer rejection was not incorporated in the contract nor posted (n. 7, p. 16, *supra*); thus, the employees could not have been apprised of it sufficiently to alleviate the unlawful encouragement of the hiring arrangement here.

The Union also complains that the reservation in the employer of the right to reject applicants does not permit differences of opinion between the union and employer as to an applicant's qualifications to be settled through grievance procedures (Br. 43-45). Even were this so, it does not follow that the right to reject requirement is improper. The end in view is not simply to guarantee the freedom of the contracting parties to reach agreement upon the handling of controversies. Rather, it is to overcome an impairment to employee freedom. The impairment results from the unfettered control that a hiring agreement like the instant one gives to the union, and the removal of such impairment necessitates a lessening of that control. The Board could reasonably conclude that, the extent to which freedom of contract is restricted by the right to reject requirement, is warranted in order to accommodate the right of nonunion members to have uncoerced access to the hiring procedures. The issue, in short, is how the tension between contractual freedom of the parties and the right of job applicants to be free from improper pressures created by contracts may best be kept in balance. The fact that the balance struck by the Board may cut to some extent into contractual freedom shows only that the Board has made an ac-

commodation of competing interests, both of which must be recognized under the Act.<sup>32</sup> This, of course, is a function which the Board frequently, and properly, performs. See, e.g., *National Labor Relations Board v. Truck Drivers Local No. 449*, 353 U.S. 87, 96; *National Labor Relations Board v. United Steelworkers*, 357 U.S. 357, 364; *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 797-798.

Finally, the third requirement—the posting requirement—informs employees and applicants of the “provisions relating to the functioning of the hiring agreement,” and thereby puts them on notice of the criteria which will govern referrals to jobs. Open notice that all who utilize the hiring hall will be treated without regard to their union sympathies or support is perhaps the most effective method of disabusing employees of the conclusion, which they might otherwise reasonably draw from the existence of a union-controlled hiring arrangement, that preferential treatment would be accorded to union members.<sup>33</sup>

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<sup>32</sup> Compare the statement of Mr. Justice Holmes in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355:

“All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.”

<sup>33</sup> The Union contends that the posting requirement of the *Mountain Pacific* safeguards is invalid because “the essential precondition to the exercise by the Board of any power to require a person to post notices is a finding that the person has committed an unfair labor practice.” (Br. 48.) The Union

In addition to its challenge to the individual standards, the Union contests the Board's authority to establish any safeguards at all, which must be observed by parties who wish to enter into an agreement providing for union-controlled hiring procedures. The gravamen of the argument is that the Board is attempting "to require incorporation of substantive terms into an agreement," contrary to the Act's policy of encouraging parties to reach agreement on their own (Br. 43, 41-43).

The contention loses sight of the relationship which the safeguard clauses have to the Board's finding of a violation based on an exclusive hiring agreement. The violation is based on the existence of the hiring agreement itself. If the Board is right in finding the violation, it is entitled to a decree enforcing its order which enjoins continuation of the unlawful contract, irrespective of its further conclusions as to the means by which such contracts may lawfully be made. It does not follow, however, that the Board is without authority to indicate its views with respect to the latter. Indeed, in view of the prevalence and importance of union referral systems in many industries, the Board's role as an administrative agency with regulatory power relating to the hire and tenure of employees plainly encompasses the obligation, not

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errs in equating the *Mountain Pacific* notice with one designed to expunge the effects of an unfair labor practice. The former is not designed to remedy an unfair labor practice, but is merely part of the means whereby the parties may, if they so desire, avoid the commission of an unfair practice. See also, pp. 58-60, *infra*.

only to condemn illegal hiring arrangements, but to chart the course whereby the parties may avoid such illegality in the future.<sup>34</sup> This is particularly true where, as here, the Board's analysis of the statutory provisions upon which the violation is based leads directly to the further question as to how the illegality may be overcome.

In this light, the protective clauses specified by the Board reflect not a gratuitous imposition of clauses into collective bargaining agreements (Un. Br. 43), but rather the Board's administrative judgment of the extent to which the Act permits hiring halls to be maintained. The Board has not ordered the parties to include these clauses in their agreement; indeed, the parties are free to abandon the hiring hall altogether if they desire. The Board has put the parties on notice, however, that the full measure of employee freedom guaranteed by the Act is compatible with a union-controlled hiring system only where the specified safeguards are included. This is no more than the Board and the courts have traditionally done in finding that a contractual provision falls short of the standard of legality. For example, it has frequently been determined that a particular savings clause is not sufficient to immunize an otherwise invalid union security agreement, on the ground that an employee cannot be expected to understand its applicability. The Second Circuit, in such a situation, has stated that "Only a specific provision deferring application of the union-security clause will immunize the con-

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<sup>34</sup> See Friendly, *A Look at the Federal Administrative Agencies*, 60 Col. L. Rev. 429, 436-437, 442-443 (1960).

tract against this illegality." *National Labor Relations Board v. Gannett News Company*, 197 F. 2d 719, 723-724 (C.A. 2), affirmed, 347 U.S. 17.<sup>35</sup> Similarly, it has been noted by the courts and the Board that a union security contract, to justify a discharge thereunder, must be expressed in clear and unmistakable language.<sup>36</sup> Determinations of this character, like the specification by the Board of the safeguard clauses, affect the substantive provisions of contracts. But, they are privileged if they are a reasonable means of implementing a statutory prohibition. That the safeguard clauses set forth in the *Mountain Pacific* case, and equally applicable to the hiring agreement in this case, are a valid means of eliminating the illegality that otherwise inheres in an exclusive hiring agreement has already been shown.

IV. THE BOARD PROPERLY FOUND THAT THE DISCHARGE OF EMPLOYEE SLATER VIOLATED SECTIONS 8(a)(3) AND (1) AND 8 (b) (2)<sup>37</sup> AND (1)-(A) OF THE ACT

Employee Slater, as shown in the Statement, *supra*, pp. 5-6, was discharged by the Company, at the request of the Union, because he had not obtained employment in accordance with the procedures established by the hiring agreement. This agreement, as we have shown,

<sup>35</sup> See also, *Red Star Express Lines v. National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board v. Shuck Construction Co.*, 243 F. 2d 519, 521-522 (C.A. 9); *National Labor Relations Board v. Broderick Wood Products Co.*, 261 F. 2d 548, 557 (C.A. 10).

<sup>36</sup> See, e.g., *National Labor Relations Board v. Electric Vacuum Cleaner Company*, 315 U.S. 685, 694-695; *National Labor Relations Board v. Don Juan, Inc.*, 178 F. 2d 625, 626, 185 F. 2d 393, 394 (C.A. 2).

was unlawful. In short, Slater's loss of employment resulted from the enforcement against him of an unlawful hiring agreement. It is settled law that such discrimination violates Sections 8(a) (3) and (1) and 8(b)(2) and (1)(A) of the Act. See, e.g., *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 586 (C.A. 1); *National Labor Relations Board v. Daboll*, 216 F. 2d 143, 145 (C.A. 9), certiorari denied, 348 U.S. 917; *National Labor Relations Board v. Waterfront Employers*, 211 F. 2d 946, 952 (C.A. 9); *National Labor Relations Board v. Alaska Steamship Company*, 211 F. 2d 357, 359-360 (C.A. 9); *National Labor Relations Board v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 259 F. 2d 741 (C.A. 7); *National Labor Relations Board v. McCloskey & Company*, 255 F. 2d 68, 70-71 (C.A. 3). Indeed, the Union does not contest in its brief the validity of the Board's finding as to Slater's discharge if the Board's finding as to the hiring agreement is correct.



## CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed insofar as it granted enforcement of the Board's order. Insofar as that judgment denied enforcement of the reimbursement provisions of the Board's order, the Court is respectfully referred to the Board's brief in No. 68 (see n. 1, pp. 3-4, *supra*).

Respectfully submitted.

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OCTOBER 1960.

## APPENDIX

The following cases, decided after the 1947 amendments to the Act but before the Board's *Mountain Pacific* decision, involve violations of the Act found by the Board in situations in which a union exercised exclusive control over hiring procedures:

*Carpenters Local 1498 and 184 (Utah Construction Co.)* 95 NLRB 196.

*Operating Engineers Local 57 (Gammino Construction Co.)* 97 NLRB 386, enforced, 201 F. 2d 771 (C.A. 1).

*Boilermakers Local 6 (Consolidated Western Steel Corp.)* 94 NLRB 1590.

*Boilermakers and its Local 92 (American Pipe and Steel Co.)* 93 NLRB 54.

*Chain Service Restaurant Employees Local 42 (Childs Co.)* 93 NLRB 281, enforced as modified, 195 F. 2d 617 (C.A. 2).

*Retail Clerks Local 770 (Hollywood Ranch Market)* 93 NLRB 1147.

*Longshoremen's Association Local 1291 (Jarka Corp.)* 94 NLRB 320, enforced as modified, 198 F. 2d 618 (C.A. 3).

*Longshoremen's and Warehousemen's Union and its Local 10 (Pacific Maritime Association)* 94 NLRB 1091, enforced, 210 F. 2d 581 (C.A. 9).

*Teamsters Local 621 (Sesco Contractors)* 98 NLRB 824.

*American Radio Association (Alaska Steamship Co.)* 98 NLRB 22, enforced as modified, 211 F. 2d 357 (C.A. 9).

*Operative Plasterers Local 867 (Morrison-Knudson Co.)* 101 NLRB 123.

*Longshoremen's and Warehousemen's Union and its Local 19 (Waterfront Employers of Washington)* 98 NLRB 284, enforced, 211 F. 2d 946 (C.A. 9).

*Marine Cooks and Stewards (Pacific American Ship-owners Assoc.)* 98 NLRB 582.

*Newspaper and Mail Deliverers Union (New York Times Co.)* 101 NLRB 589.

*Boilermakers and its District Lodge 57, Locals 363, 679 (Ebasco Services, Inc.)* 107 NLRB 617.

*Boilermakers Local 13 (Babcock and Wilcox Co.)* 105 NLRB 339.

*Heat and Frost Insulators Local 28 (Construction Specialties Co.)* 102 NLRB 1542, enforced, 208 F. 2d 170 (C.A. 10).

*Operative Plasterers Local 797 (Haddock Engineers Ltd.)* 104 NLRB 994, enforced as modified, 215 F. 2d 734 (C.A. 9).

*Longshoremen's Association, District Councils and Locals (Puerto Rico SS. Assoc.)* 103 NLRB 1217, enforced, 211 F. 2d 274 (C.A. 1).

*Pacific Coast Marine Firemen (American President Line)* 107 NLRB 593.

*Carpenters Local 472 and Machinists Union (McGraw Construction Co.)* 107 NLRB 1043.

*Carpenters Local 1281 (J. C. Böespflug Co.)* 109 NLRB 874.

*Carpenters Mohawk District Council, et al. (Grow Construction Co.)* 109 NLRB 522, enforced, 222 F. 2d 542 (C.A. 2).

*Electrical Workers Local 1533 (Golden Valley Electric Association, Inc.)* 109 NLRB 397.

*Iron Workers Local 595 (Bechtel Corp.)* 108 NLRB 1070, enforced, 218 F. 2d 958 (C.A. 6).

*Machinists Association, et al. (Seabright Construction Co.)* 108 NLRB 8.

*Iron Workers Local 595 (R. Clinton Construction Co.)* 109 NLRB 73.

*Teamsters Local 148 (Harry Griffin Trucking Co.)* 114 NLRB 1494.

*Carpenters Local 1423 (Columbus Showcase Co.)* 111 NLRB 206, enforced, 238 F. 2d 832 (C.A. 5).

*Millwrights Local 2484 (W. S. Bellows Construction Corp.)* 114 NLRB 541.

*Electrical Workers Local 948 (Hall Electric Co.)* 111 NLRB 68.

*Hod Carriers Local 264 (Jones-Hettelsater Construction Co.)* 112 NLRB 1482.

*Hod Carriers Local 369 (Frommeyer and Co.)* 114 NLRB 872, enforced as modified, 240 F. 2d 539 (C.A. 3).

*Operating Engineers Local 12 (AGC, Southern Calif. Chapter)* 113 NLRB 655, enforced as modified, 237 F. 2d 670 (C.A. 9).

*Iron Workers Local 36 (H. E. Stoudt and Son, Inc.)* 114 NLRB 838.

*Carpenters, its Locals 1400 and 1046, et al. (Pardee Construction Co.)* 115 NLRB 126.

*Operating Engineers Locals 18, 18-A, and 18-B (Hatcher Bros., Inc.)* 116 NLRB 1145.

*Hod Carriers Local 276, et al. (Mountain Pacific, Seattle, and Tacoma Chapters of AGC)* 117 NLRB 1319.

*Operating Engineers Local 542 (Frommeyer & Co.)* 117 NLRB 1863, enforced, 255 F. 2d 703 (C.A. 3).

*Meat Cutters Local 88 (A and P)* 117 NLRB 1542.

*Heat & Frost Insulators and its Local 47 (Alexander-Stafford Corp.)* 118 NLRB 79, enforced, 254 F. 2d 955 (C.A. D.C.).

*Longshoremen's and Warehousemen's Union Local 10*  
(*Pacific Maritime Association*) 102 NLRB 907, enforced, 214 F. 2d 778 (C.A. 9).

*Carpenters Local 1028 (Dennehy Construction Co.)*  
111 NLRB 1025, enforced, 232 F. 2d 454 (C.A. 10).

*Electrical Workers and its Locals 501 and 781*  
(*County Electric Co.*) 116 NLRB 1080.

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Nos. 64 AND 85

# In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,  
PETITIONER,

THE NATIONAL LABOR RELATIONS BOARD

THE NATIONAL LABOR RELATIONS BOARD  
PETITIONER,

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF OF LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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**In the Supreme Court of the United States**

OCTOBER TERM, 1960

NOS. 64 AND 85

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64

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.  
PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD

---

85

THE NATIONAL LABOR RELATIONS BOARD  
PETITIONER,

v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

---

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**REPLY BRIEF OF LOCAL 357**

The Board's position in this case is reached by dividing Section 8 (a) (3) of the Act in two parts, the first having to do with "discrimination" in employment, and the second dealing with encouragement of union membership. The Board then proceeds on the premise that the term "discrimination" can be equated with the term "difference" or "disparity", that the term embraces *any* such difference in

employment without reference to union membership (using that term in its broadest sense), and that such discrimination has been established in this case by reason of the referral agreement under which two classes of job seekers have been created—those who must apply through the union, and those who need not. The Board then proceeds to the conclusion that it can reasonably be inferred from the mere existence of this referral agreement that an encouragement of union membership results within the meaning of the concluding portion of Section 8 (a) (3). The Board offers this formula: Any difference in treatment of employees respecting their tenure, term or condition of employment plus a resulting and reasonably inferrable encouragement or discouragement of union membership equals a violation of Section 8 (a) (3).<sup>1</sup>

It is respectfully submitted that the Board's premise is fallacious, its conclusion is unwarranted in fact and in law, and its resulting formula is overly pat. Section 8 (a) (3) is indivisible, and to divide it as the Board does would imperil the whole fabric of collective bargaining. Under the Board's reasoning, since all collective agreements create discriminations which reasonably could be said to encourage union membership, all could be held violative of Section 8 (a) (3).

# I

**THE BOARD'S PREMISE THAT A "DISCRIMINATION" EXISTS IN THIS CASE OR THAT ANY DISCRIMINATION SUFFICES IS ERRONEOUS; THE DISCRIMINATION MUST HAVE SOME RELATIONSHIP OR REFERENCE TO UNION MEMBERSHIP.**

*A. There is no "discrimination" created in this case by the establishment of the referral system.*

<sup>1</sup> A violation of Section 8 (a) (3) if done by an employer, a violation of Section 8 (b) (2) if done by a union, and in addition respective automatic violations of Section 8 (a) (1) and 8 (b) (2), Section 7 rights being necessarily involved.



We will demonstrate shortly that the term "discrimination" as used in Section 8(a)(3) necessarily must have regard to union membership or the lack of it and is integrally and inseparably related to the latter portion of Section 8(a)(3) so that the Section must be read and applied only as a whole. However, even though it be assumed with the Board that a separation can be made and that any difference or disparity in employment constitutes a "discrimination", no such difference or discrimination exists in this case.

The discrimination in the present case, says the Board (Brief, p. 19), consists of "the division of employees by the instant contract into those who are cleared for employment through the hiring hall and were thereby eligible to work, and those who are not so cleared and are thereby precluded from working." But this difference does not constitute any sort of discrimination, difference or disparity in this case no matter how those terms are defined. This is so because the Board has failed accurately to define the class to which the requirement of recourse to the dispatching service or hiring hall is applicable. The class involved under the referral agreement in the present case is composed of all workmen who desire casual employment. All within that class are subject to the same requirement of proceeding through the hiring hall, and all within that class have been treated equally here in respect to their employment rights. A requirement which is applicable to the whole class cannot constitute discrimination against any member of the class. *People v. Arlen Service Stations, Inc.*, 284 N. Y. 340, 31 N. E. 2d 184, 186; *Slome v. Godley*, 304 Mass. 187, 23 N. E. 2d 133, 137. What the Board brief is in reality saying is that to enforce a uniform standard is to discriminate against the member of the class who chooses to disregard it. But it is as impossible to say that a worker who seeks casual employment is discriminated against when he is required to resort to the hiring hall as it is impossible to say that a motorist is discriminated against who is re-



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quired to travel the right way on a one-way street, or that a customer is discriminated against when he is denied admission to a store before opening hours or after closing hours, or that an applicant to law school is discriminated against when he is denied admission because he does not have a college degree uniformly required of all students seeking entrance. If the creation of a class of those who have to go through the union for a job and those who don't creates a relevant difference or "discrimination", then so does the creation of a class of those who must be represented by a union in obtaining and maintaining their conditions of employment and those who do not. This, as we will now show, simply cannot be so.

*B. There is "no discrimination" relating to union membership or in any invidious sense as required by the Act.*

Even if one were to assume with the Board that the relevant class consists of workers seeking casual employment who do not wish to go through the union for employment, the creation of that class as such does not constitute a "discrimination" as the term used in Section 8(a)(3). That term used in the context of the National Labor Relations Act cannot be made to stand alone or be given its bare, literal or dictionary meaning as was the case in *Federal Trade Commission v. Anheuser Busch, Inc.*, 363 U. S. 536, relied upon by the Board in this case. (Board Brief, p. 24.) The National Labor Relations Act, unlike the Clayton Act under consideration by this Court in *Anheuser Busch*, deals with persons, not products, with individual rights and the relationships between unions and employers. Its ultimate purpose is to foster free collective bargaining in the making of agreements, and as an important means to that end, as we have seen in our principal brief, p. 25, it prohibits not simply any type of discrimination but only that discrimination which has relevance to union membership or the lack of it and which operates to encourage or discourage such membership. All life and law is rooted in

different treatment based upon rational classification. *Tanner v. Little*, 240 U. S. 369, 381-383. But offensive differentiation which the law prohibits "goes no further than the invidious discrimination." *Williamson v. Lee Optical*, 348 U. S. 483, 489; *Morey v. Doud*, 354 U. S. 457, 463. And it hardly establishes "invidious discrimination" to show that the union has contracted to require employees within the unit it represents to follow a particular course of conduct and to insist upon adherence to that course. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid.*" (emphasis supplied.) *Ford Motor Co. v. Huffman*, 345 U. S. 330, 338. A representative is not "barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit." *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192, 203.

On the Board's premise that any disparity or difference in employment created by a union or an employer, or both together, furnishes a predicate for a Section 8(a)(3) violation, the entire collective bargaining process is imperiled. All collective bargaining agreements contain many differences or discriminations which reasonably could be said to encourage union membership. Indeed, the mere fact that the union is given the status of an *exclusive* bargaining representative creates the exact type of discrimination with resulting tendency to encouragement which the Board relies upon to conclude that the union-operated referral sys-

ten or hiring hall unlawfully encourages union membership. With the union acting as the administrator of the collective agreement, it is to the interest of employees to "ingratiate" themselves with the union (to use that term to accord with the sense of the Board's basic argument in this case) by taking active part in the union's activities just as much if not more than it is to their interest to do so when the union is the source of employment in the first instance. The union's power of contract interpretation as applied in particular instances to particular persons, and particularly the union's function as the negotiator of grievances under collective agreements, makes it as important for the employee to stand in well with the union as in the case where the hiring is done through the union. There, as here, the Board could well say that a disparity or difference has been created by the establishment under the collective agreement of a class of persons who must look to the union for contract interpretation or assistance in the settlement of grievances and a class of those who do not have to so look, and equally well might the Board conclude that it can reasonably infer from the fact of this difference that there is an encouragement of union membership.

Indeed, there are particular disparities or discriminations created by collective bargaining agreements which directly encourage union membership, but which this Court has held to constitute no violation of the National Labor Relations Act. We refer to the case of *Aeronautical Industrial Lodge v. Campbell*, 337 U. S. 521. In that case the collective agreement provided that union stewards, by virtue of their union office alone, were to be accorded a superseniority beyond that accorded veterans, and this Court refused to hold that an invalid discrimination was thereby effected. While this Court's decision in that case involved merely the question of whether the clause constituted a discrimination in violation of the Veterans Preference Act, this Court, when it later considered another

type of seniority clause in *Ford Motor Company v. Huffman*, *supra*, 345 U. S. at 339, directly decided the precise question of whether collectively bargained seniority provisions creating alleged discriminations violated the National Labor Relations Act, and in holding that they did not, made particular reference to the situation in *Aeronautical Industrial Lodge*. Thus, in *Huffman*, this Court stated as follows:

"The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility. We have held that a collective-bargaining representative is within its authority when, in the general interest of those it represents, it agrees to allow union chairmen certain advantages in the retention of their employment, even to the prejudice of veterans otherwise entitled to greater seniority. *Aeronautical Industrial Dist, Lodge v. Campbell*, *supra* (337 US at 526-529)".<sup>2</sup>

It is submitted that the Board's argument and reasoning in the present case cannot be reconciled with this Court's decisions in *Ford Motor Company v. Huffman* and *Aeronautical Industrial Lodge v. Campbell*, *supra*. In *Aeronautical Lodge*, a difference or disparity could be said to exist even more than it could be said to exist in this case, and that difference had even more relationship to union membership as such than is true here. In this case, Slater was denied employment not because he was or wasn't a union member or active in union affairs but because he chose to obtain employment outside the framework which had been set up by the union and the employer in the process of bargaining. In *Aeronautical Lodge*, the individuals received preferential treatment not because of their

<sup>2</sup> See also a recent decision of the Board in *Hooker Chemical Corp.*, 128 NLRB No. 133, decided August 30, 1960, in which the Board upheld an arrangement in a collective agreement under which employees desiring to obtain leaves of absence which would not affect their seniority were obliged to obtain the approval of the union as well as of the employer.

actual union membership or lack of it, but because of the functions, albeit union functions, they were performing. In neither case was there any discrimination in the invidious sense of a deliberate attempt to create a preference based on the mere fact of union membership. It is for that reason that there cannot be said to be a violation of Section 8(a)(3), unless there is an element of invidiousness having a relationship to union membership as such.

The legislative history of Section 8(a)(3)<sup>3</sup> indicates that the evil Congress was intending to cope with was a preference or discrimination predicated upon the bare fact of union membership or the lack of such membership, and the course of Board decision until the present one has consistently followed an interpretation of the term "discrimination" in Section 8(a)(3) as having a necessary relationship to union membership. In *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, heavily relied upon by the Board, union membership as such was directly involved because access to the hiring hall in that case was restricted to members in good standing, and the job applicant was refused access to the hall because he had lost his membership through infraction of the union rules. Thus the discrimination in that case was directly referable to union membership.

To require a regard for union membership or the lack of it in defining the term "discrimination" as used in Section 8(a)(3) does not, as the Board argues, render the concluding portion of Section 8(a)(3) superfluous for the reason that the Section must be read as an entity. The concluding language of the Section merely gives body, content and direction to the provision as a whole. The provision cannot be separated or broken down as the Board has done here; it must be read singly if obviously unintended results are not to follow. This Court so read it in *Radio Officers, supra*, when it said:

<sup>3</sup> 93 Cong. Rec. 4318, II Leg. Hist. 1097.



"Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization as proscribed." (347 U.S. 17, 43)

What has been said above does not detract from the declaration of this Court in *Radio Officers* (347 U. S. at 40 and Board Brief, p. 34) that it is the "policy of the Act . . . to insulate employees' jobs from their organizational rights". All that we are saying is that a union referral provision in a collective bargaining agreement, equally with a provision which gives to the union the exclusive right to handle grievances, let alone a provision giving seniority preference to union stewards, does not operate to interfere with the right of employees "to freely exercise their rights to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers, supra*, 347 U. S. at 40. There is nothing in this case to indicate Slater was refused employment because he was not a union member in good standing or even because he was not an active member. There is nothing in this case to indicate that Slater or any other casual employee was not free to join or not join, or be a good, bad, or indifferent member of Local 357, any more than the same could be said of any bargaining relationship in which the union is the exclusive bargaining representative, or where the union must be looked to for the purpose of processing grievances or perform any other of the numerous functions or services of an exclusive bargaining representative. Accordingly, absent the showing of some connection between the alleged disparity or difference asserted by the Board in this case, and an employee's union membership or the lack of it, it cannot be said that there was a "discrimination" within the meaning of that phrase as used in Section 8(a)(3).

In summary then, since differentiation of itself does not establish invidiousness, something additional must be shown to demonstrate that offensive inequality inheres in



the contractual requirement that casual employment be sought only through the dispatching service. But in its analysis of statutory discrimination in employment effected through the existence of the hiring hall, the Board brief does not undertake to show that this contractual requirement is not relevant to the plain economic purpose of regularizing casual employment, of providing employers with an efficient means of hiring casual labor, and of assuring the employees of a fair, evenhanded, and dignified means of securing casual employment. Rather, the Board brief explicitly disclaims the only inquiry that the Board is authorized to make, namely, whether the contractual standard is referable to or based upon union membership or its lack. The Board brief rests upon the single element that under the contract casual employment will be denied to employees who attempt to secure it without recourse to the dispatching service. But in the absence of an additional vitiating factor—which the Board brief not only does not show but disclaims the need to show—all that this demonstrates is that the employee must do what the contract required. But, as we have seen in our principal brief, page 35, it cannot constitute “invidious discrimination” to insist that an employee who wishes casual employment seek it through the means that the contract provides. We repeat, “A labor agreement is a code for the government of an industrial enterprise” (*Aeronautical Industrial Lodge v. Campbell*, 337 U. S. 521, 528), and freedom from discrimination does not free the employee from obedience to the code any more than it frees the citizen from obedience to the law. The statutory prohibition against discrimination in employment does not license industrial anarchy.

The Board's position must rest on the assumption that discrimination referable to union membership or the lack of it is necessarily established from the fact that it is the union which operates the dispatching service to which recourse is required to secure casual employment. The Board

brief does not trouble to explain how, standing alone, discrimination is shown by a union's operation of a hiring hall any more than discrimination would be shown by an employer's operation of its personal office. The Board's position can make sense only by indulging the presumption that the union will operate the hiring hall discriminatorily by preferring members and disadvantaging non-members. We agree that the Board does act on this presumption but we disagree both with its rationale and that it has the power to do so.

## II

### **THE BOARD'S CONCLUSION THAT IT CAN REASONABLY INFER THAT THE REFERRAL CLAUSE IN AND OF ITSELF OPERATES TO ENCOURAGE UNION MEMBERSHIP IS UNWARRANTED BOTH IN FACT AND IN LAW.**

Under the guise of supporting the Board's conclusion that a union's operation of a hiring hall *unlawfully* encourages union membership "is reasonable", the Board brief attempts to document the tenability of the Board's presumption that a union operates a hiring hall discriminatorily. This attempt is logical. For the only encouragement which the statute interdicts is that which flows from detriment to the employee referable to his lack of union membership or default in the performance of the obligations of union membership. The Board is therefore driven to attempt to show that the mere existence of the union-operated hiring hall operates to encourage union membership. It does not attempt to show that the operation of the hiring hall has in fact had that effect.

#### **A. The Board's Version of the "Character" of a Hiring Hall**

The Board brief recites its version of the character of a hiring hall (Bd. br. pp. 30-34). The dominant theme in the Board brief that a union is given complete and un-

fettered control over hiring conflicts with the record in this case. There are in this case at least five significant respects in which the employer controls hiring. (1) An employer's request to dispatch a named employee for casual work is complied with if that employee is present at the hall when the request is received (R. 31, 17, Tr. 308). (2) The employers have and exercise the authority to reject a referred employee deemed unsatisfactory (R. 34-35). (3) The agreement specifically provides that "Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status". (4) The employer is free to hire casual employees "from any other available source" if the dispatching service notifies the employer that "such help is not available" through it, or if the employees dispatched "do not appear for work at the time designated by the employer" (R. 63). (5) The hiring hall is "three miles or over" from the union hall (R. 14), so that it cannot be said that any undue pressure exists by the reason of the fact that the union headquarters itself is the hiring hall.

Furthermore, even where union hiring halls exist, employers customarily exercise the right to determine whether to hire the employees sent to them by the union. Thus, at p. 158 of the Senate Hearings on S. 1973,<sup>4</sup> it is said that, "It has been traditional in the construction industry, whether or not the workmen were union members, for the employer to have the right to select the workmen best suited for the work to be done. . . ." And the book cited for another purpose at p. 31, n. 14, of the Board brief states at p. 43 that, "The employer is normally free . . . to refuse to hire a man sent out by the local without prejudice toward requesting a replacement."

<sup>4</sup> Hearings, S. 1973, Senate Subcommittee, Labor & Labor-Management 82nd Cong., 2d Sess., p. 158.

## B. The Board Brief's Reliance upon The Board's Alleged Experience with Hiring Halls

1. The Board brief draws upon the Board's alleged experience with hiring halls (Board brief, p. 33 and Appendix to Board brief.) The Appendix lists 44 examples of such experience. If these sample decisions are numbered in the order in which they appear in the Appendix and then analyzed, the following will appear:

Subject of Cases	Number of Cases
A. Cases in which the conduct at issue involved no hiring hall or union participation in the initial hiring process .....	10 <sup>a</sup>
B. Hiring hall cases	
1. The agreement establishing the hiring hall is non-discriminatory on its face but discriminatory in application.....	8 <sup>b</sup>
2. The hiring hall is not established by agreement but operates in practice to give preference to union members.....	3 <sup>c</sup>
3. The agreement establishing the hiring hall provides on its face for discriminatory dispatch .....	7 <sup>d</sup>
4. Illegal hiring hall arrangement in which the unfair labor practice at issue was unrelated to the hiring hall.....	1 <sup>e</sup>

<sup>a</sup> Cases 7, 14, 15, 21, 25, 26, 27, 32-33, 44.

<sup>b</sup> Cases 3, 4, 42, 20, 28, 34, 36, 38.

<sup>c</sup> Cases 9, 43, 35.

<sup>d</sup> Cases 1, 2, 8, 12, 10, 13, 19.

<sup>e</sup> Case 5.

Subject of Cases	Number of Cases
C. Closed Shop cases	
1. Written closed shop agreements providing for hiring through the union, partly or wholly, but in which apparently no formal hiring hall was operated.....	9 <sup>10</sup>
2. Oral closed shop agreements providing for hiring through the union, partly or wholly, but in which apparently no formal hiring hall was operated.....	3 <sup>11</sup>
3. Closed or otherwise illegal union shop providing for hiring through the union, partly or wholly, with apparently no operation of a formal hiring hall, but in which the unfair labor practice at issue did not involve the hiring process..	2 <sup>12</sup>

It is plain from the foregoing that, of the 44 cases in the so-called "sample," 10, or more than 22 percent have nothing whatever to do with the operation of a hiring hall. Represented in these 10 cases is any kind of case in which an act of discrimination of whatever variety occurred.

Furthermore, of the 44 cases in only 19 does it appear that the hiring process involved the actual operation of a hiring hall. This constitutes 43 percent of the "sample," and averages 2.7 cases each year for a seven-year period. And of the 19, there are but 8 cases in which the agreement establishing the hiring hall is non-discriminatory on its face but discriminatory in operation. This constitutes 18.1 percent of the "sample," and somewhat better than one case per year in a seven-year period. This hardly constitutes a basis in "experience" for saying that an otherwise non-

<sup>10</sup> Cases 11, 16, 17, 18, 29, 37, 39, 40, 41.

<sup>11</sup> Cases 23, 30, 31.

<sup>12</sup> Cases 6, 22.

discriminatory agreement is necessarily invalid and that there must still be added the Board's three requirements to guard against discriminatory application.

As stated in our principal brief (p. 39), the Board cannot use its asserted expertise to support pivotal assumptions or substitute experience for evidence.<sup>13</sup> There is not a jot of actual evidence that Slater or any other casual employee was in fact discriminated against because of his union membership or lack of it, and the Board relies entirely on conjecture and presumption supported by an alleged "expertise" which it has not demonstrated.

2. Not only does the Board brief misstate what the "sample" shows, but the "sample" is otherwise thoroughly unscientific in conception. Excluded from the "sample" are cases in which the Board dismissed complaints alleging unlawful union participation in the hiring process. *E.g.*, *Motor Truck Association of Southern Cal.*, 110 NLRB 2151; *Maxon Construction Co.*, 112 NLRB 444; *International Asso. of Theatrical Stage Employees*, 119 NLRB 81. Similarly excluded are cases in which the Courts of Appeals reversed findings by the Board of unlawful union participation in the hiring process. *E.g.*, *Local 553, Teamsters Union v. N.L.R.B.*, 266 F. 2d 552 (C.A. 2); *N.L.R.B. v. Painters*

<sup>13</sup>We refer the Court to a recent definition of the term "expertise" formulated by Trial Examiner William E. Spencer in his Intermediate Report in the case of *Local Union No. 741, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry and Independent Contractors Association*, Case No. 21-CP-7 (I.R., p. 7, footnote 5): "expertise, that quality of know-all in a given field which magically invests the administrative judge from the moment he takes the oath, regardless of prior experience; a quality that is unpredictable, fickle and diverse, for what is firmly established by expertise today, may be dismissed tomorrow as having no firmer foundation than conjecture or mere suspicion; itself of the nature of an irrebuttable presumption it begets irrebuttable presumptions; a term which lost much of its lustre in the declining days of the New Deal and has since yielded ground to more commonplace expressions such as 'specialized knowledge' or just plain 'experience', substitutions which appear to satisfy those remonstrants of excess bureaucratization under an earlier régime."



*Union*, 242 F. 2d 477, 478-480 (C.A. 10); *Del E. Webb Construction Co. v. N.L.R.B.*, 196 F. 2d 841 (C.A. 8). Nor is any account taken of the countless instances of everyday operation of hiring halls without any blemish. The Board brief would thus determine the incidence of a disease by excluding from the survey those who recovered from it and those who never contracted it.

3. The baseless inference that the Board brief would draw from its "sample" is that unions are inveterate law breakers for whom an "*ad hoc*" search into the circumstances of each case of alleged discrimination is bootless and to whom a comprehensive and institutional approach must be applied. If this approach is sound as to unions, it is *a fortiori* sound as to employers, for the Board's statistics show that acts of discrimination are far more widespread among employers than unions. Thus, a comparative study of workers receiving back pay, and who were thus the victims of discrimination, shows that:

Fiscal Year	Back Pay From Employers		Back Pay From Unions	
	Number of Employees	Sum	Number of Employees	Sum
1958 <sup>14</sup>	1,368	\$ 673,260	291	\$88,673
1957 <sup>15</sup>	1,457	515,910	222	85,149
1956 <sup>16</sup>	1,955	1,322,904	205	65,410
1955 <sup>17</sup>	1,836	785,710	188	95,510
1954 <sup>18</sup>	2,202	891,556	122	37,890
1953 <sup>19</sup>	2,987	1,307,230	196	49,950
1952 <sup>20</sup>	2,734	1,345,882	87	23,910

<sup>14</sup> NLRB, 23 Ann. Rep. 146.

<sup>15</sup> NLRB, 22 Ann. Rep. 164.

<sup>16</sup> NLRB, 21 Ann. Rep. 166.

<sup>17</sup> NLRB, 20 Ann. Rep. 162.

<sup>18</sup> NLRB, 19 Ann. Rep. 158.

<sup>19</sup> NLRB, 18 Ann. Rep. 96.

<sup>20</sup> NLRB, 17 Ann. Rep. 282.

Since it is apparent that employers are guiltier than unions, the Board would be justified on its theory in devising "institutional" requirements for employers in exercising their personnel functions. Thus, if the plant is unrepresented, the employer should post on its bulletin boards a statement that obtaining and retaining employment is not based on, or in any way affected by, union membership or activity, and the statement should further explicate the objective standards used by the employer in exercising its power to hire, promote, and discharge employees; if the plant is represented by a union, the same procedure must be followed, and in addition the standards must be incorporated into the collective bargaining agreement. An employer who fails to do the foregoing is presumed to exercise its personnel functions discriminatorily.

This is the logic of the Board's reasoning. We think it would be absurd were it applied to employers. We submit it is no less absurd when applied to unions.

4. The premise of the appendix sample embraces a fundamentally false tenet. What we said in our opening brief (p. 38), quoting from the Supreme Court's decision in *Rountree v. Smith*, 108 U.S. 269, 276, bears repetition: We do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law or to justify . . . making such a presumption." "In this country," as Judge Swan has stated, "imputed crime is substantially unknown." *Warhauser v. Lloyd Sabaudo S.A.*, 71 F. 2d 146, 148 (C.A. 2). "Guilt with us remains individual and personal. . . . It is not a matter of mass application." *Kotteakos v. United States*, 328 U.S. 750, 772. It is still true that "guilt by association remains a thoroughly discredited doctrine. . . ." *Uphaus v. Wyman*, 360 U.S. 72, 79.

### C. The Board Brief's Version of the "History" of the Hiring Hall

The Board brief states that before the 1947 amendments the hiring hall was linked with the closed shop (Bd. br. p. 31). This was then entirely lawful. The Board brief further states that the 1947 amendments invalidated the closed shop. This is true.<sup>21</sup> The Board brief would then draw from this "history" the inference that, although the closed shop was invalidated in 1947, unions nevertheless thereafter continued to operate hiring halls upon a closed shop basis. It is a novel application of the presumption of continuity to say that a course of conduct, legal when initiated, continues to be pursued after it has been illegalized.

The Board brief's version of "history" is such that it feels free totally to ignore the incontrovertible fact that the hiring hall as an economic institution came into being and exists because it is addressed to and solves the genuine need of regularizing casual employment. The Board brief not only ignores this fact, but it compounds its lack of compunction by suggesting that, unlike other economic benefits negotiated by unions, a union negotiates a hiring hall to help itself. This inference will not be appreciated by the longshoreman who no longer has to shape up, the seaman who no longer has to be hired off the dock, or the

<sup>21</sup> A closed shop requires existing union membership as a condition of initial employment. The 1947 amendments amended Section 8(3), now Section 8(a)(3), to permit union membership as a condition of employment beginning 30 days after hire, or 30 days after the effective date of the agreement, whichever is later, and to provide that the agreement could be invoked to cause the discharge of an employee only for non-payment of periodic dues and initiation fees. The 1959 Amendments permit a 7-day instead of a 30-day grace period. It is significant that the 1959 Amendments, Section 705, added a new Subsection (f) to Section 8 of the National Labor Relations Act to permit the union hiring hall in the construction industry, but nowhere is it provided in the law that the three requirements which the Board insists on as a condition of a valid agreement be incorporated. This would seem to indicate Congressional belief that the hiring hall in and of itself does not constitute an undue invasion of Section 7 rights or tend to encourage union membership.

building and construction craftsman or other casual laborer who no longer has to make the rounds searching haphazardly for work. The Staff Report of Committee on Labor and Public Welfare, U. S. Senate, 82nd Congress, 2nd Session, states at p. 12 that "the subcommittee and the committee of which it is a part have several times pointed to the evils which frequently result from alternative methods [to the hiring hall] such as the shape-up. It is not unlikely, as revealed by the Kefauyer Crime Committee and later by the New York State Crime Commission, that the absence of the hiring hall in the maritime industry is an open invitation to kick-backs, and the penetration of the water front by the most corrupt elements in the community." We do not think that a union need apologize when it negotiates an agreement establishing a hiring hall to eliminate such evils.

The Board brief argues that by virtue of its operation of a hiring hall, the union has power to command respect and allegiance from applicants irrespective of the union's success as collective bargaining representative. Precisely the same statement can be made of the union's status as the representative which empowers it to negotiate all the terms of an agreement, to adjust grievances, and to invoke arbitration to settle unresolved contract disputes. "It has been said that there is no greater form of encouragement to membership in a union than granting it exclusive recognition."<sup>22</sup> Is then collective bargaining to be outlawed as encouragement of union membership? For the reasons set forth in Point I of this Reply, we think not.

**D. The Board Brief's Disclaimer that The Board Indulges a Presumption of Discriminatory Operation of a Hiring Hall**

The Board brief disclaims reliance upon a presumption that the Union will in fact discriminate in favor of mem-

<sup>22</sup> *Curtis Brothers, Inc.*, 719 NLRB 232, 238, enforcement denied, 274 F. 2d 551 (C.A.D.C.), affirmed, 362 U.S. 274.

bers when referring men, but states—not entirely consistently—that its purpose is to show that applicants can reasonably feel that their employment depends on their good standing with the union given complete and unfettered control of hiring by the employer. This rationalization will not withstand analysis.

1. The disclaimer cannot be accepted. It is inconsistent with the brief's attempt to document just such a presumption through its version of the "character and history" of hiring halls and its invocation of the Board's "experience" with them. And it is at odds with the Board's explicit statements in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883. The Board stated that (*id.* at 896):

... it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty . . .

It also stated that (*id.* at 895):

... for all the Employers know or care, the Union's purpose in selecting some and rejecting others may be encouragement towards union membership, or towards adherence to union policies, matters which, were they the basis for direct employer selection, would constitute clear discriminations within the meaning of Section 8(a)(3) of the Act.<sup>23</sup>

2. The Board brief states that it does not rely upon a presumption that a union will discriminate but relies instead upon the view that employees "reasonably feel" the union will discriminate. This is reliance upon the presumption once removed. For the Board cannot subscribe

<sup>23</sup> Contrast the statement of the Court of Appeals for the Second Circuit: "The fact that . . . [a union agent] might have discriminated against . . . [an employee] is no evidence that he or the Union committed any discriminatory act." *Local 553, Teamsters Union v. N.L.R.B.*, 266 F. 2d 552, 554-555.

to the reasonableness of the employee's belief without also endorsing the validity of the employee's appraisal upon which any such belief must rest. And to reasonably justify the belief the appraisal must be that the union will act discriminatorily.

3. To condemn the union on the basis of an employee's belief, in the absence of an overt discriminatory act on the union's part, is, as stated in our principal brief, p. 36, to embrace with a vengeance the crime of imagining the king's death. For the union stands condemned not for what it did, or even for what it thought, but for what another thought. But, as Mr. Justice Jackson has said, "I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred." *American Communications Assn. v. Douds*, 339 U.S. 382, 437. And, *a fortiori*, "We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others." Mr. Justice Brennan in *In re Sawyer*, 360 U.S. 622, 635.

### III

#### THE BOARD BRIEF FAILS TO ESTABLISH EITHER THE BOARD'S POWER TO FORMULATE ANY REQUIREMENTS OR THE VALIDITY OF THE SPECIFIC REQUIREMENTS IT DID DEVISE.

1. Although the Board held that a hiring hall cannot be validly established without incorporating into the agreement the three requirements it devised, the Board brief resists any inquiry into the power of the Board to formulate any requirements or the validity of those it prescribed (Bd. br. p. 51 *et seq.*). Since the alternative to complying with the requirements is to relinquish the operation of a hiring hall, it seems obvious that the Board cannot impose "a choice between the rock and the whirlpool" without establishing its power to act at all and the validity of



what it does do. *Frost v. Railroad Commission*, 271 U.S. 583, 593.

2. A necessary premise upon which the Board founds its power to formulate contractual requirements for the operation of a hiring hall is that it is within its power to ban its functioning altogether. We submit that Congress did not commit to the Board the power to destroy the hiring hall and that its continued existence is not dependent upon administrative largesse.<sup>24</sup>

3. The Board suggests that the alternative to operating a hiring hall without incorporating the three requirements into the agreement is to operate a non-exclusive rather than an exclusive hall (that is, one in which employment may be sought either through the hall or upon direct application to the employer). This is a distinction the practical significance of which has escaped the General Counsel and Board members. In a question and answer guide to the application of *Mountain Pacific* the then General Counsel of the Board stated that (5 CCH Lab. Law Rep. ¶50,087, p. 50,262):

The applicability of *Mountain Pacific* would appear to depend on the particular and peculiar facts of each specific case, and to turn, in the ultimate analysis, on whether the facts establish the existence of an exclusive referral system within the meaning of *Mountain Pacific*. It would appear that the applicability of *Mountain Pacific* is not restricted to situations where the employer hires 100 percent on the basis of union-referral, but will be determined in light of the total hiring picture. If the totality of the hiring picture establishes in a given case that the basic objectives of *Mountain Pacific* are being thwarted, then *Mountain Pacific* would

<sup>24</sup> According to Board Member Joseph A. Jenkins, "There were those on the Board who were going to completely outlaw all hiring halls." Address to Building Industry Employers of New York State, at Lake Placid, New York, June 27, 1959, p. 7.

appear to be applicable notwithstanding the fact that the employer does some hiring at the job site.

Board Member John H. Fanning stated that:<sup>25</sup>

Sometimes in discussions, I have heard the question raised as to whether *Mountain Pacific* and *Brown-Olds* apply in the case of a non-exclusive hiring hall. This question may be more technical than real, because generally hiring halls are not operated on a non-exclusive basis.

And Board Member Joseph A. Jenkins stated that:<sup>26</sup>

Now, of course, there are many interesting technical questions which can be raised in the application of the Board's *Mountain Pacific* formula. For example, the first question that occurs is: When is a hiring hall exclusive, and when is it nonexclusive? Is it a non-exclusive hiring hall if you hire at least one employee a year from sources other than the hall? This type of question leaves me a little impatient and leads me to believe that the person asking the question does not understand that the National Labor Relations Board is interpreting a statute embodying a social policy and not a criminal statute. If a substantial part of all the employers' employees come from the hiring hall, I would say that the union was the agent of the employer under *Mountain Pacific* for purposes of that hiring hall. Any other interpretation goes into technicalities which lose sight of what the Board is trying to do.

Furthermore, even where the distinction between an exclusive and a non-exclusive hiring hall to command more respect than it does, to operate a hall on a non-exclusive basis is to surrender one of its major virtues. An exclusive hall funnels all job opportunities to a central locus from which they can be distributed on an evenhanded basis. Men who use the hall need not fear that they are losing work to

<sup>25</sup> Address, Union Shops and Hiring Halls, Third Yale Law School Alumni Day, April 25, 1959, p. 7.

<sup>26</sup> Address to Contracting Plasterers and Lathers International Association, Washington, D. C., June 3, 1959, 44 LRR 135, 141.

others who are making the rounds. Todayism to employers is reduced and the temptation upon the employer to offer and upon the employee to snag a job at less than the prevailing union standard is minimized. Thus, the alternative of a non-exclusive hiring hall, which the Board brief suggests as an equivalent to the exclusive hall, involves the relinquishment of important advantages.

The statutory concept of free and private collective bargaining is at war with the view that, upon a subject about which the employer and the union are at liberty to disagree, the Board can effectively compel both to accede to what neither may want and either may resist.

4. The Board brief fails altogether to meet the specific objections to the validity of the three requirements which we have detailed in our brief (pp. 32-37). The Board brief suggests that a union which is performing its statutory obligation to treat members and nonmembers equally can have no legitimate objection to telling job applicants that it does so. We think it suffices to say that one does not have to be a thief to resist and resent filing an affidavit that he is not.

Respectfully submitted,

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JAMES R. BROWNING, CI

Nos. 64 AND 85

# In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.  
PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD

THE NATIONAL LABOR RELATIONS BOARD

PETITIONER,

v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## SUPPLEMENTAL REPLY BRIEF OF LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

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In the Supreme Court of the United States

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64

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
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85

THE NATIONAL LABOR RELATIONS BOARD

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**SUPPLEMENTAL REPLY BRIEF OF LOCAL 357,  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA**

What we have said in our Reply Brief respecting the  
necessity that the term "discrimination" as used in Section

8 (a) (3) of the Act have a relationship or reference to union membership, and respecting the inability of the Board to infer an unlawful discrimination from the mere existence of an otherwise lawful agreement, even though that agreement may be said to have a tendency to be perverted into a system of unlawful discrimination; is fully borne out by a very recent decision of the United States Court of Appeals for the Ninth Circuit—*Pittsburgh-Des Moines Steel Company v. N.L.R.B.*, —F. 2d—, 47 JRRM 2135, decided November 15, 1960. The decision in that case was issued too late for inclusion in our Reply Brief herein. The decision, we believe, affords complete support for our basic position in this case, and we have attached hereto, as an Appendix, a copy of the full text of the opinion for the convenience of this Court.

In substance, the Ninth Circuit in *Pittsburgh-Des Moines, supra*, held that the Board was not warranted in drawing any inference of unlawful discriminatory action by an employer because of the mere existence of a system of paying bonuses used by the company which was capable of discriminatory application in respect to union employees on strike. The analogy between that system and the referral system in this case is an exact one. In reversing the Board, the court discussed at length the decisions of this Court in the *Radio Officers* group of cases and stated as follows:

The conclusive presumption of intent set out in *Radio Officers* is dependent upon two prerequisites. First, the encouragement or discouragement of union membership must be a natural and foreseeable consequence of the employer's discrimination. And second, the discrimination itself *must* be based solely upon the criterion of union membership. This second prerequisite is, we think, of the utmost importance. For if every discriminatory



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action taken by an employer which could foreseeably result in the encouragement or discouragement of union membership were proscribed by the Act, very few of the legitimate prerogatives of management could survive the flood of unfair labor practice charges. That the Act is not designed to produce such a result is evidenced by the amendment to § 10(c), 29 U.S.C.A. § 160(c), contained in the Taft-Hartley law, to wit, that the Board shall not require the reinstatement of any employee who has been suspended or discharged for "cause." As Professor Cox has noted, the amendment to § 10(c) did not really alter the meaning ascribed to the discrimination provisions from the very beginning. The Act has always permitted the employer to infringe on employees' rights when the infringement is motivated by a desire to protect rights which are legitimately the employer's. See Cox, Some Aspects of the Labor Management Act, 1947, 61 Harv. L. Rev. 1920-24 (1947). Thus, even though a natural foreseeable consequence of employer discrimination might be the discouragement of union activity, such discrimination is not unlawful unless actuated by an intent to achieve the foreseeable consequence rather than by a desire to carry out a legitimate business function. Radio Officers' limits rather than contradicts this basic proposition.

Radio Officers' renders the true intent of the employer irrelevant for all practical purposes *only* in situations where the employer's discrimination is based solely on union membership or activity. In those cases, the inference which the Board is permitted to draw operates in effect to eliminate the requirement that the General Counsel show an actual intent to encourage or discourage union membership. Radio Officers' thus propounds an exception to the usual "true intent" interpretation of § 8(a)(3), an exception born of the need to prevent an employer from indulging in discriminatory action at the threatful behest of an aggressive

union while insulating himself from unfair labor practice charges by claiming in all truth that his discrimination was motivated not by an intent to encourage or discourage union membership, but by a desire to avoid the financial travail attendant upon labor strife. Radio Officers' is obviously directed at and effectively curbs the use of economic coercion by unions to effectuate employer discrimination, an abuse which otherwise might have gone temporarily unchecked under the Act. By eliminating the necessity to show unlawful intent where the employer discriminates solely on the basis of union membership, Radio Officers' precluded under any circumstances the most obvious kind of discrimination provoked by unions and the kind of discrimination which had been brought about by union pressure in all three of the appeals there consolidated by the Court. When criteria other than union membership or activity are used as the basis for an employer's discrimination, the exceptional rule of Radio Officers' does not apply since the kind of discrimination which impelled the rule is absent. It is then up to the Board to predicate a conclusion of unlawful intent upon more specific evidence; a showing of the discriminatory treatment plus its natural and foreseeable consequences will not suffice. In such cases, unlike Radio Officers', the employer claims that he discriminated among his employees not because of their union activities but because of business reasons having nothing to do with labor relations, reasons such as good and bad work, good and bad attendance records, long and short terms of service and the like. (47LRRM at 2140-41 [footnotes omitted])

This is not an easy case. We are fully aware that the vacillations of group productivity are predictably so closely related to participation by the group in protected activity that an extension of the Radio Officers' rule may well be thought appropriate from a policy viewpoint. Indeed the fifth factor in the

Company's formula is so broad and flexible that it fairly cries out for abuse, abuse which could conceivably insure that only the low group productivity caused by engagement in prolonged strikes would result in the denial of bonuses. Nonetheless, we do not think the record in the instant case justifies such a step. The evidence showed that petitioner had initiated the administration account procedure in 1936, only one year after the passing of the Wagner Act and before the first Labor Act cases were decided by the Supreme Court. This, fact, in our view, minimizes the possibility that the formula was devised as a coverup for unlawful discrimination. Moreover, the evidence before the Board clearly failed to establish that the formula was in fact so utilized or that the formula was not used at all. *An employer is not guilty of unfair labor practices simply because his activity can all too easily be perverted into a system of unlawful discrimination. The unlawful act itself, not proximity to it, must be shown.* [Emphasis supplied.]

(47 LRRM at 2145)

It is significant that the sole authority cited by the Board for its thesis is a dictionary definition (Board brief fn. 18); a line of cases holding that agreements which expressly require union membership as a condition of employment are unlawful (Board brief fn. 10); and an asserted analogy under the Robinson-Patman Act derived from *Federal Trade Commission v. Anheuser-Busch*, 363 U. S. 536. As to the last, the issue of "motive", i.e., "predatory intent", was expressly remanded to the Court of Appeals. The contrary, that is, that in Labor Board cases the employer's motivation is controlling, has long been well-settled. "... the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for

other reasons than such intimidation and coercion." *N.L.R.B. v. Jones and Laughlin Corp.*, 301 U. S. 1, 46 (1937). *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U. S. 177, 186-187 (1941); *Radio Officers v. N.L.R.B.*, 347 U. S. 17, 42-44 (1954). Under the Board's presently proposed rule, the action of an employer in closing a unionized plant because it was losing money (thus producing disparate treatment between those laid off and those retained at other plants), in granting a wage increase to employees within an appropriate bargaining unit and not to others (thereby resulting in disparate treatment between those in and those outside the unit (Cf. *Radio Officers v. N.L.R.B.*, *supra*, at p. 47)) in offering superseniority to shop stewards (thus producing a disparate treatment between those who are and who are not shop stewards (see *Aeronautical Lodge v. Campbell*, 337 U. S. 521, 526-29; *Trailmobile Co. v. Whirls*, 331 U. S. 40, 53, fn. 21)) would constitute the necessary "discrimination"; in each of these instances it is not difficult to find that union membership is encouraged or discouraged. Union action directed to these ends would of course be equally proscribed under Section 8 (b) (2). The Board seeks by this rule vastly to enlarge its jurisdiction to police any employer choice affecting the status of employees; whatever his motivation or economic justification, to limit the inquiry under Section 8 (a) (3) to the single question whether union membership is encouraged or discouraged thereby, and by this means effectively to read out of the Act the phrase "by discrimination." Any such rule would justify the worst fears concerning the reach of the Act which Chief Justice Hughes took such pains to rebut in *N.L.R.B. v. Jones and Laughlin Corp.*, *supra*, at pp. 33-34, 43-46. Insofar as dictionary language is concerned, the Board notes that "discriminate" also means "to distinguish accurately" (Board

Brief, p. 19). This would enable the Board to find "discrimination" if an employer distinguished accurately between applicants for employment on the basis of their competency.

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JAN 12 1961

## APPENDIX

FULL TEXT OF OPINION OF  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT  
IN  
PITTSBURGH-DES MOINES STEEL COMPANY

v.

## NATIONAL LABOR RELATIONS BOARD

No. 16690, November 15, 1960

BONE, Circuit Judge:—Petitioner, the Pittsburgh-Des Moines Steel Company, fabricates and sells steel products in interstate commerce. It operates manufacturing plants at Pittsburgh, Pennsylvania, Des Moines and West Des Moines, Iowa, and Santa Clara and Fresno, California; it maintains warehousing facilities at Santa Clara, Fresno, Sacramento, Stockton and El Monte, California. There is no question but that petitioner must conform to the strictures of the National Labor Relations Act, as amended. &

Since sometime prior to 1946, petitioner has customarily made gifts of Christmas bonuses to the employees at its various plants and facilities. From 1946 through 1950 all of the Company's employees received yearly yuletide bonuses even though workers at the Pittsburgh plant had struck for 12 days in 1946, and for 12 to 14 days in 1947. In 1951 all employees were given a bonus with the exception of those in the production and maintenance unit organized by the United Steelworkers of America at the Pittsburgh plant. These men had struck for 46 working days during the year. From 1952 through 1955 all employees received bonuses except for the men at the Fresno plant in 1955; the Fresno installation had not been bought by Pittsburgh-Des Moines until August of that year. In 1956 no bonus was



paid to any of the Company's employees. In 1957 all employees got a bonus except for the members of the production and maintenance unit organized by the Steelworkers at the Santa Clara plant. These workers had carried on an economic strike for a total of 57 working days during 1957. No contractual provision has ever obligated the Company to award Christmas gifts; the bonuses have always been gratuitous.<sup>1</sup>

The Company's failure to grant a bonus to the production and maintenance workers at Santa Clara in 1957 resulted in the unfair labor practice charges presently before us on review. The National Labor Relations Board found that petitioner had violated §§ 8(a)(1) and (3) of the Act, 29 U.S.C.A. §§ 158(a)(1) and (3) by restraining its employees from engaging in a strike protected by § 7 of the Act, 29 U.S.C.A. § 157, and by discouraging its employees from participating in such protected activity by discriminating against them in regard to a term or condition of their employment. In reaching its conclusions the Board overruled its Trial Examiner, who found that the Company had traditionally awarded bonuses pursuant to a plan called the Five Factor Formula, that this formula was used in 1957, that its use did not establish ipso facto that the Company intended to discourage economic strikes by discriminating against

<sup>1</sup> During collective bargaining negotiations in 1956, the Steelworkers Union, on behalf of the production and maintenance unit at Santa Clara, tried to get the Company to insert in the bargaining contract a past practices clause which would have obligated the Company to continue all customary practices and procedures which it had carried on in the past, including the gratuitous Christmas gift. The Company specifically refused to enter into an agreement which would require as a matter of contract that it give the yearly Christmas bonus. It maintained that the bonus had always been and should remain voluntary and gratuitous on its part. So, although other practices were contractualized, the Christmas gift was not.

those who took part in them and that consequently there was no violation of the Act. The Board, on the contrary, ruled that the Company did not use the Five Factor Formula in regard to the Santa Clara production and maintenance workers in 1957, that these employees were denied bonuses solely because they had engaged in a prolonged strike and that even if the Five Factor Formula had been applied, its use alone constituted sufficient proof that the Company did intend to discourage and interfere with protected activity by discriminating against the strikers in regard to the customary bonus. The Board concluded that petitioner had violated §§ 8(a)(1) and (3) and issued its order accordingly.

The crux of a violation of § 8(a)(1) or (3) is the true purpose or real motive of the employer in taking the action complained of. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46, 1 LRRM 703 (1937); *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132, 1 LRRM 732 (1937); *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 42-44, 33 LRRM 2417 (1954). And the sole question in this case, as *phrased by both parties*, is whether or not the Board's finding that the motive for withholding the bonus to members of the Santa Clara production and maintenance unit was to penalize them because they engaged in a prolonged strike is supported by substantial evidence.

The Company's position is that of the Trial Examiner: the Five Factor Formula was applied in 1937 as in preceding years, bonuses were not denied to the strikers at Santa Clara merely because they struck, and the application of the formula does not constitute the type of discrimination from which, without specific evidence of motive, the Board might infer that the Company intended to discourage protected activity. See *Radio Officers' Union v. N.L.R.B.*, *supra*, at

44-48. If, however, the basis by which petitioner claims it selects deserving employees, i.e., the Five Factor Formula, cannot be differentiated from the type of discrimination which in *Radio Officers* was held to create an irrebuttable inference of intent sufficient to support findings of unfair labor practices, petitioner cannot here prevail. We look initially to the manner in which the Five Factor Formula in theory discriminates.

The five factors are: (1) overall results, (2) overall productivity, (3) results at each individual plant, (4) productivity at each individual plant, and (5) continuity of work effort at each individual plant. The first two factors are used to determine whether petitioner has had sufficient overall earnings during the year to justify granting a bonus to any of its employees. If examination of these two factors reveals that operations have been sufficiently profitable to warrant payment of a bonus, the work at each of the Company's plants is evaluated in order to determine which employees should or should not be rewarded. Factor 3, the results at individual plants, is apparently determined by profit and loss figures. These figures, however, testified Cedric A. Fegtly, a witness for the Company, do not differentiate as to efficiency among the various groups of employees working out of each plant. This is because the Company does designing and construction work in addition to fabrication, the work done in the shop, and the profit or loss realized from all three activities is apparently lumped together to form the profit or loss total for each plant. Consequently, to determine the efficiency or productivity of each of the various groups of employees working in or out of a single plant, the Company looks to the fourth factor, the productivity of the individual plant. This is determined by the balance or imbalance in what the Company refers to as the plant's administration account. Such an account is

apparently kept for each of petitioner's installations, or at least for its manufacturing facilities.<sup>2</sup>

On the debit side of an administration account are placed those costs which cannot be allocated to a specific job or contract, or, in other words, what is usually referred to as overhead. These costs include taxes, fringe benefits to the working force, holiday pay, vacation pay, jury pay, social security benefits, insurance benefits, hospitalization benefits, depreciation on all items in the plant, factory maintenance, power, light and heat, and wages and salaries paid to all employees whose efforts cannot be broken down in terms of man hours worked in a particular job or contract; in sum, all those expenditures which cannot feasibly be traced to work for a particular customer. On the credit side of the account the Company places the product which results from the multiplication of the cost of direct labor, that is labor which is attributed to and charged upon a specific contract, by a percentage figure which varies according to the type of direct labor involved and which represents the percentage which the Company has ascertained through experience will, when multiplied by normal direct labor costs, result in a dollar amount which will balance or exceed the debit or cost side of the administration account. Each customer is charged not only for the cost of direct labor on the particular job but also for that part of the credit sum in the administration account which is traceable to work done for him. That is, the customer pays the product of direct labor costs on his job multiplied by the appropriate percentage figure, in addition to paying for the direct labor itself. If everything works out properly, the Company should be

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<sup>2</sup> Petitioner introduced into evidence a "Summary of Administration Results, 1946-1957" for all of its manufacturing or fabricating plants with the exception of the Fresno facility. Since the figures appearing in this document and their implications will be of some significance in later discussion, we think it convenient to reproduce the Summary below:

## SUMMARY OF ADMINISTRATION RESULTS, 1946-1957

+ Indicates Credits exceeded Costs and Income resulted

- Indicates Costs exceeded Credits and Loss resulted

Administration	Pittsburgh	Des Moines	Santa Clara	W. Des. - Moines
1957 Costs	2,222,021	1,229,964	624,735	443,206
Credits	2,517,754	1,321,423	424,265	415,661
	+ 295,133	+ 91,459	-200,470	- 27,545
1956 Costs	2,103,214	939,946	537,323	347,325
Credits	2,193,099	634,362	488,405	215,636
	+ 89,885	- 245,584	- 48,918	-131,689
1955 Costs	1,867,843	1,043,801	502,296	211,356
Credits	1,822,871	935,026	416,732	81,247
	- 44,972	- 108,775	- 85,564	-130,109
1954 Costs	2,185,230	1,341,896	430,975	
Credits	2,105,196	1,229,270	368,541	
	- 80,034	- 112,626	- 62,434	
1953 Costs	2,037,501	1,147,122	281,829	
Credits	1,801,029	1,116,156	364,282	
	- 236,472	- 30,966	+ 82,453	
1952 Costs	1,611,726	882,138	256,959	
Credits	1,538,356	925,033	249,952	
	- 73,370	+ 42,895	- 7,007	
1951 Costs	997,701	506,137	219,910	
Credits	809,960	699,044	181,670	
	- 187,741	- 7,093	- 38,240	
1950 Costs	936,890	598,278	172,039	
Credits	719,008	566,916	160,382	
	- 217,882	- 31,362	- 11,657	
1949 Costs	912,686	520,464	136,128	
Credits	828,853	509,491	108,878	
	- 83,833	- 10,973	- 27,250	
1948 Costs	840,018	462,883	104,202	
Credits	769,988	441,330	92,974	
	- 70,030	- 21,553	- 11,228	
1947 Costs	649,134	393,590	42,354	
Credits	632,883	376,688	10,555	
	- 16,251	- 16,902	- 31,799	
1946 Costs	584,032	320,292		
Credits	456,152	283,927		
	- 127,880	- 36,364		

taking in from its customers all or almost all of that which it pays out for overhead. The Christmas bonuses to the employees covered by each administration account is part of the overhead and is listed on the debit side of the ledger.

The Company maintains, the Board assumed, and we therefore do not question that when an appreciable loss shows on the administration account, something is radically wrong with the plant's productivity and efficiency. This is true if, as the Company claims, the normal cost of direct labor multiplied by the appropriate percentage figure approximates the total expenditures for overhead or, in other words, the debit side of the administration account.<sup>3</sup> For when direct labor falls off the costs thereof are lessened, and the multiplicand in the mathematical calculation used to determine the amount on the credit side of the account becomes smaller. The multiplier—the arbitrary percentage figure—does not become larger proportional to the decrease in direct labor costs, and therefore the product is lower than it would have been had direct labor costs remained at the higher, "normal" level.

The Company also looks to the fifth factor which the evidence shows is something more than the description by which it is identified. Continuity of work effort or work relationship includes not only the continued operation of

<sup>3</sup> We have some difficulty fitting together on the basis of information imparted by the record before us the theoretical operation of an administration account and the figures appearing in the Summary of Administration Results set out at note 2, *supra*. The Summary shows that both the cost and the credit totals for each account almost invariably increased with each succeeding year. Yet there is no evidence demonstrating that the growth in expenses for overhead was at all proportional to a rise in direct labor costs, that direct labor costs were artificially raised so that the credit side of an account could keep pace with the upward spiral on the cost side, or that the Company's "appropriate" percentage figure was determined in accordance with estimated overhead at each particular plant for the year in question. This last idea seems most plausible,



each individual plant but the forecast for the plant's continued operation and profitability for the future. The continuity of work effort is therefore affected by the economic health of the country, by the economic well-being of the area where the plant is located and by the trend in both the business of the Company as a whole and the business of the individual plant. Much depends upon the continuity of the jobs and contracts available to a particular plant in its own location.

In applying this formula in 1957, the Company contends that analysis of factors 1 and 2 demonstrated that income from all plants and installations was sufficient to justify the granting of a bonus at Christmas of that year. The profit from the Santa Clara plant in 1957 was also exceedingly good. The Company claims that it decided to withhold the bonus from the production and maintenance workers at Santa Clara because of factors 4 and 5. The administration account at Santa Clara for 1957 showed an appreciable excess of costs over credits, indicating a loss in productivity among the production and maintenance workers, who, it seems, were the only employees whose direct labor costs went into the calculation of the credits in the administration account of the Santa Clara plant.<sup>4</sup> The Company further

but all the evidence shows on this point is that the appropriate percentage figure was learned by the Company through experience and varied from job to job and from plant to plant. In any event, since the Board's decision apparently accepts the notion that in theory the imbalance in an administration account indicates low productivity on the part of those employees whose direct labor costs are used to figure the credit total, we shall proceed upon the same hypothesis.

<sup>4</sup> In addition to the production and maintenance workers, there were at Santa Clara approximately 100 other employees of the Company; accountants, sales directors, construction people, administrative and clerical employees, a group of men from a tool house directly connected with construction, a few watchmen and a gardener. All of these other employees received a 1957 Christmas bonus; however, none of their direct

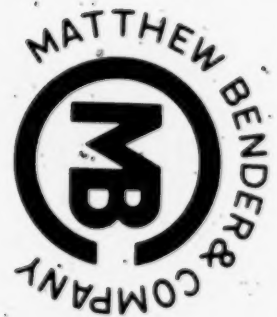


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claims that the poor productivity of the production and maintenance workers at Santa Clara determined pursuant to factor 4 did not conclude the bonus issue. The last factor, continuity of work effort, was also examined and was found to militate against giving a bonus to those at Santa Clara whose productivity was wanting. Not only was the continuity of effort at Santa Clara disrupted by the strike but recession was upon the nation, the collective bargaining contract between the Company and the Steelworkers was to be reopened in its entirety for negotiations in 1958, a situation pregnant with the possibility of troubles for the Company, and the business prospects for the Santa Clara plant, located as it was in an agricultural area, were purportedly foreboding. In consequence, the production and maintenance men there were denied a Christmas bonus in 1957.

This, in theory, is how the Five Factor Formula works and how, according to petitioner and the Trial Examiner, the decision to deny the 1957 bonus to the production and maintenance unit at Santa Clara was reached. For purposes of dealing with the second ground upon which the Board predicated its conclusion that the Company had violated §§ 8(a)(1) and (3) of the Act—that the application in 1957 of the Five Factor Formula even as it works in theory is sufficient without more to establish an intent on the part of the Company to interfere with and to discourage protected activity—we assume arguendo that the

labor costs were used to compile the credit figure in the Santa Clara administration account. There was sketchy testimony to the effect that the labor of some of these other employees figured in another administration account, but the account itself was never brought into evidence. All the record shows is that the direct labor of the production and maintenance men was the sum total of that direct labor the costs of which were used in "the" Santa Clara administration account. See Summary of Administration Results at note 2, supra. Consequently, as far as productivity was concerned, the imbalance in the Santa Clara account for 1957 is indicative only of the work of the production and maintenance employees.

formula was used as petitioner claims. Although the workings of the formula seem involved, we think they can be boiled down to one essential consideration, at least insofar as 1957 was concerned. The *sine qua non* for the denial of the bonus to the Santa Clara production and maintenance workers in 1957 was clearly their failure to achieve sufficient productivity to satisfy the demands of the fourth factor in the Company's formula. The considerations embodied in the fifth factor may well have clinched the denial of the bonus, but without the application of the fourth [factor], the yearly gift clearly would not have been withheld.<sup>5</sup> Accordingly, we feel justified in distilling the Company's argument, in accord with its brief on appeal, to the proposition that bonuses were denied the Santa Clara workers because, as shown by factor 4, they failed to achieve a sufficiently high level of group productivity,<sup>6</sup> and that to award and encourage high group productivity is a prerogative of management and a legitimate business pursuit which does not violate the act. The Board's position, on the other hand, is that since group

<sup>5</sup> That the fifth factor could not have been the decisive consideration in withholding the bonus to the production and maintenance workers is borne out by the fact that the gardener and watchmen at Santa Clara did receive a 1957 Christmas bonus. Although the imbalance in the Santa Clara administration account did not show inefficiency on their part, see note 4, supra, the gardener and the watchmen surely cannot be deemed to have contributed their efforts to the entire West Coast operation of the Company rather than to the Santa Clara plant, which they watched and gardened. If, under the fifth factor, prospects were bad for Santa Clara, yet good for the West Coast as a whole, prospects for the watchmen and the gardener would be bad—although perhaps good for other employees at Santa Clara whose efforts were devoted to the broader, West Coast operation. Thus, if the fifth factor were governing, the gardener and the watchmen would not have received a bonus. But they did.

<sup>6</sup> The productivity which the administration account in theory measures is the group productivity of those whose direct labor costs are used to compile the credit total. The account is blind insofar as direct labor costs for each individual worker are concerned, and an imbalance indicates nothing in regard to the work of a particular employee.

productivity must always be affected by a prolonged strike, and was so affected to the detriment both of the Santa Clara strikers in 1957 and the Pittsburgh strikers in 1951, the discrimination called for by the Five Factor Formula in 1957 was based upon engagement in protected activities. Such discrimination leads naturally to the foreseeable consequence that the protected activity is interfered with and discouraged, and, pursuant to the Radio Officers' decision, the discrimination itself is thereby sufficient to establish the unlawful intent of the Company.

*Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 33 LRRM 2417 (1954) was a consolidated disposition of three cases, among which was *N.L.R.B. v. Gaynor News Co.*, reported below at 197 F.2d 719, 30 LRRM 2340 (2d Cir. 1952). In that case the Board had held that the News Company had violated §§ 8(a)(1) and (3) of the Act by contractually granting retroactive wage increases and gratuitously awarding vacation payments to its employees who were union members while refusing both the contractual and gratuitous benefits to those of its employees who were not union members. Both union and non-union employees comprised a single bargaining unit for which the union was bargaining representative. The union had entered into a contract with the company providing that in the event the parties negotiated a new contract, the wage rates set out therein would be deemed retroactive for a period of three months; the benefits of such retroactivity, however, were to be given only to union members. Subsequently, a new contract was entered into, and in accord with its agreement with the union, the employer made lump-sum payments to its union employees in the amount of the differential between the old and new wage rates for the three months' retroactive period. In addition to fulfilling this contractual obligation, the company gratuitously awarded its union employees added vacation benefits for



the same retroactive period. The company's non-union employees received neither the lump-sum payments nor the vacation benefits realized by the union members. There was no evidence of a motivation on the part of the employer to encourage union membership. Indeed, there was a great deal of evidence tending to show that the union pressured the employer into acting contrary to its own predilection. See 347 U.S. at 34-38; Note, 42 Geo. L.J. 565 (1954).

With these facts in mind, the Court set out to examine the significance and proof of an employer's motive for the purposes of finding a § 8(a)(3) violation. First, the Court reaffirmed the proposition that the employer's purpose, intent or motive in indulging in discriminatory activity is controlling upon the question of a § 8(a)(3) violation. *Id.* at 42-44. Specific evidence of this intent, however, is not essential in all cases; it was not essential in *Gaynor*. Specific proof of intent, said the Court, is unnecessary where employer conduct inherently encourages or discourages union membership, for a man is held to intend the foreseeable consequences of his conduct. Where a natural consequence of an employer's discrimination is encouragement or discouragement of union membership, his protestation that he did not intend to encourage or discourage must be unavailing. If the Board finds that encouragement or discouragement will result, the unlawful intent of the employer is sufficiently established. Despite this broad language the Court clearly chose to limit the Board's ability to infer unlawful intent from a showing of discrimination and the foreseeable results thereof to those situations where the discrimination is based solely upon union membership or union activity. Such discrimination

<sup>1</sup> Radio Officer<sup>2</sup> reaffirms the interpretation of "union membership" as encompassing participation in legitimate union activities. 347 U.S. at 39-40, 33 LRRM 2417. To avoid undue verbosity we will use the phrases "union membership," "union activity" and "protected activity" interchangeably in this opinion.



based solely on union membership, was exercised in the Gaynor case, and, said the Court, since a natural, foreseeable consequence of the company's activity was the encouragement of membership in the favored union, both encouragement and intent to encourage were established. Id. at 44-46. The Court then proceeded to hold that the contract obligating the company to discriminate in favor of the union was invalid and no defense to those unfair labor practice charges emanating from the discriminatory, lump-sum, retroactive wage payments to union members. As far as the employer's discrimination in regard to the gratuitous vacation benefits was concerned, the contract was apparently deemed irrelevant. Id. at 46-48.

The conclusive presumption of intent set out in *Radio Officers'* is dependent upon two prerequisites.<sup>8</sup> First, the encouragement or discouragement of union membership must be a natural and foreseeable consequence of the employer's discrimination. And second, the discrimination itself *must* be based solely upon the criterion of union membership. This second prerequisite is, we think, of the utmost importance. For if every discriminatory action taken by an employer which could foreseeably result in the encouragement or discouragement of union membership were proscribed by the Act, very few of the legitimate prerogatives of management could survive the flood of unfair labor practice charges. That the Act is not designed

<sup>8</sup> Mr. Justice Frankfurter, concurring in *Radio Officers'* suggests that the inference of intent allowed by the Court is rebuttable and that the Court's opinion and his concurrence are not in disagreement. 347 U.S. at 55-57. While this may well be a consummation devoutly to be wished, the language of the majority opinion refutes the idea that the inference of intent raised by discrimination solely on the basis of union activity is rebuttable. For the Court said, "[A]n employer's protestation that he did not intend to encourage or discourage *must* be unavailing where a natural consequence of his action was such encouragement or discouragement." Id. at 45. The emphasis is ours.

to produce such a result is evidenced by the amendment to § 10(c), 29 U.S.C.A. § 160(c), contained in the Taft-Hartley law, to wit, that the Board shall not require the reinstatement of any employee who has been suspended or discharged for "cause." As Professor Cox has noted, the amendment to § 10(c) did not really alter the meaning ascribed to the discrimination provisions from the very beginning. The Act, has always permitted the employer to infringe on employees' rights when the infringement is motivated by a desire to protect rights which are legitimately the employer's. See Cox, Some Aspects of the Labor Management Act, 1947, 61 Harv. L. Rev. 1, 20-21 (1947). Thus, even though a natural foreseeable consequence of employer discrimination might be the discouragement of union activity, such discrimination is not unlawful unless actuated by an intent to achieve the foreseeable consequence rather than by a desire to carry out a legitimate business function. Radio Officers' limits rather than contradicts this basic proposition.

Radio Officers' renders the true intent of the employer irrelevant for all practical purposes *only* in situations where the employer's discrimination is based solely on union membership or activity. In those cases, the inference which the Board is permitted to draw operates in effect to eliminate the requirement that the General Counsel show an actual intent to encourage or discourage union membership. Radio Officers' thus propounds an exception to the usual "true intent" interpretation of § 8 (a)(3), an exception born of the need to prevent an employer from indulging in discriminatory action at the threatful behest of an aggressive union while insulating himself from unfair labor practice charges by claiming in all truth that his discrimination was motivated not by an intent to encourage or discourage union membership, but by a desire to avoid the financial travail attendant upon

labor strife. *Radio Officers'* is obviously directed at and effectively curbs the use of economic coercion by unions to effectuate employer discrimination, an abuse which otherwise might have gone temporarily unchecked under the Act. By eliminating the necessity to show unlawful intent where the employer discriminates solely on the basis of union membership, *Radio Officers'* precluded under any circumstances the most obvious kind of discrimination provoked by unions and the kind of discrimination which had been brought about by union pressure in all three of the appeals there consolidated by the Court.<sup>9</sup> When criteria other than union membership or activity are used as the basis for an employer's discrimination, the exceptional rule of *Radio Officers'* does not apply since the kind of discrimination which impelled the rule is absent. It is then up to the Board to predicate a conclusion of unlawful intent upon more specific evidence; a showing of the discriminatory treatment plus its natural and foreseeable consequences will not suffice.<sup>10</sup> In such cases, unlike *Radio Officers'*, the employer claims that he discriminated among his employees not because of their union activities but because of business reasons having nothing to do with labor relations, reasons such as good and bad work, good and bad attendance records, long and short

<sup>9</sup> We do not mean to say that *Radio Officers'* applies only in cases where union pressure is discernible; it applies in all cases where the employer's discrimination is based solely on union activity. We mean only to suggest, although perhaps it is not incumbent upon us to rationalize a Supreme Court decision, that the *raison d'être* for *Radio Officers'* is the necessity as a matter of policy to prevent employer discrimination at the instigation of an ambitious union.

<sup>10</sup> "But if [the employer's] criterion is, for example, individual employee efficiency or seniority, then something more [than the discrimination] would be necessary for showing an unfair labor practice." *N.L.R.B. v. Richards*, 265 F.2d 855, 869, 43 LRRM 2820 (3rd Cir. 1959). In the *Richards* case, *Radio Officers'* was applied; the discrimination was based solely on union membership.

terms of service and the like. See *Bituminous Material & Supply Co. v. N.L.R.B.*, 281 F.2d 365, 46 LRRM 2770 (8th Cir. 1960); *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F.2d 705, 44 LRRM 2755 (9th Cir. 1959); *N.L.R.B. v. Ford Radio & Mica Corp.*, 258 F.2d 457, 42 LRRM 2620 (2d Cir. 1958).

In the instant case—we are still assuming that the Five Factor Formula was applied as claimed—the Company did not discriminate against the Santa Clara strikers solely because they struck. Indeed, if the Company's argument was that it discriminated solely on the basis of the strike, but didn't intend to discourage union activity, we would have an entirely different situation, one in which the sole criterion for discrimination would be protected union activity. Here, however, the employer has discriminated *on the basis of group productivity*, not participation in a prolonged strike. The difficulty in the case is that the group's productivity, an aspect of business which management could seemingly reward and encourage, is foreseeably dependent and, the evidence indicates, actually was dependent upon the lack of a prolonged strike. In other words, group productivity will almost always rise and fall in proportion to participation by the group in prolonged walkouts: the facts in the instant case exemplify the generalization. And there is a difference between this situation and one where the basis of the employer's discrimination has nothing whatever to do with protected activity. When an employer discharges a union organizer for kleptomania or disturbing women employees, the purported cause of discharge has no relation at all to protected activity, while in the present case the alleged cause of the denial of the bonus, lack of group productivity, is the direct result of participation in protected activity. In seeking to enlist the assistance of Radio Officers' the Board equated diminished group productivity with participation in a prolonged strike and concluded

that discrimination on the basis of lower group productivity was in this case no different from discrimination on the basis of striking, a protected activity. This in effect means that under *Radio Officers* an employer cannot use the lack of group productivity as a criterion for withholding a bonus when such a lack is caused by the group's engagement in a lengthy strike.

We disagree.

That protected union activity is the direct cause of a business condition upon which an employer actually predicates discrimination among his employees does not mean that the basis for discrimination is the protected union activity. An employer may hire permanent replacements for economic strikers even though the business condition—a lack of manpower—which impels the employer to act was directly caused by the strike. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345, 2 LRRM 610 (1938). Discussion in *Olin Mathieson Chemical Corp. v. N.L.R.B.*, 232 F.2d 158, 37 LRRM 2895 (4th Cir. 1956), affirmed per curiam, 352 U.S. 1020, 39 LRRM 2508 (1957) and in *N.L.R.B. v. California Date Growers Association*, 259 F.2d 587, 42 LRRM 2805 (9th Cir. 1958), indicates that when in order to obtain replacements for economic strikers it is necessary for an employer to promise seniority to the replacements, the denial of seniority status to those strikers who are reinstated is not an unfair labor practice, although the business condition which actuated the employer to deny seniority status to reinstated strikers was directly caused by the strike itself.<sup>11</sup> And in *Local 200, International Brotherhood of Teamsters v. N.L.R.B.*, 233 F.2d 233, 238, 38 LRRM 2095 (7th Cir. 1956), the court approved a conclusion of the

<sup>11</sup>To the same effect see *N.L.R.B. v. Potlatch Forests, Inc.*, 189 F.2d 82, 28 LRRM 2128 (9th Cir. 1951), decided prior to *Radio Officers*. The grounds upon which the later cases distinguished or disagreed with *Potlatch* do not pertain to the present problem.



Board which held that an employer had not committed an unfair labor practice by discharging an employee because the demand for his job had ceased, even though the job was rendered unnecessary by the employee's own picketing. The picketing, a protected union activity, had caused business to drop off with the result that the employer no longer had any need for the job which the employee had been doing. See *Atlas Storage Division*, 112 NLRB 1175, 1195, 36 LRRM 1171 (1955).

In all the cases mentioned above the business condition upon which the employer predicated his discriminatory action was the direct result of participation in protected union activity by those employees who were discriminated against, yet *Radio Officers'* was not applied; the employer's true intent was looked into. We think the instant case must be treated similarly. There is surely sufficient evidence from which the Board could conclude as it did that if the Company used the Five Factor Formula, the lack of group productivity on the part of the production and maintenance workers at Santa Clara was the cause of their failure to receive a Christmas bonus in 1957. There was also sufficient evidence from which the Board could infer that the poor productivity of the Santa Clara group was caused by their participation in a prolonged strike during the year in question. The strike may well have caused the business condition—poor productivity—which the employer used as the criterion for its determination to withhold the bonus, but the protected union activity was not in itself the basis of the employer's discrimination. Consequently, *Radio Officers'* does not apply.<sup>12</sup> To enforce the Board's order we

<sup>12</sup> In view of our conclusion that *Radio Officers'* is inapplicable in the present case because the discrimination here was not based solely upon union membership, we consider it unnecessary to examine the other reasons urged by petitioner in support of its inapplicability argument. As to the possible effect of the contractual negotiations, see note 1, *supra*, between the Company and the Steelworkers Union at Santa Clara, see



must find in the record substantial evidence of the motive or intent which underlay the Company's action, evidence other than the discriminatory action and its foreseeable consequences.

This brings us to the first ground upon which the Board predicated its conclusion that petitioner had violated §§ 8 (a)(1) and (3) of the Act: that Pittsburgh-Des Moines as a general rule did not adhere to the Five Factor Formula but rather gave bonuses to all of its employees or to none of them and that the denial of the 1957 bonus to the strikers at Santa Clara, like the denial of the 1951 bonus to the strikers at Pittsburgh, were exceptions to the general practice, exceptions designed to penalize employees who participated in prolonged walkouts.

In determining that petitioner's general practice in regard to the yearly Christmas bonus was to give to all or to give to none, the Board relied upon two strands of evidence. First, it apparently considered that the history of petitioner's yuletide gifts implied such a practice. To recap the pertinent facts set out previously, all employees received bonuses every year since 1946, except in 1951, when the Pittsburgh strikers who had stayed out for 46 working days got no gift, in 1955, when the Fresno employees who had been working for Pittsburgh-Des Moines only since August of that year, were left out, in 1956, when no employees received a gift, and in 1957, when the Santa Clara strikers were denied a bonus. Omitting the self-explanatory denial of a bonus to the Fresno workers in 1955, we cannot deny that the Company did in fact give a bonus either to all or

N.L.R.B. v. Nash-Finch Co., 211 F.2d 622, 33 LRRM 2898 (8th Cir. 1954); Intermountain Equipment Co. v. N.L.R.B., 239 F.2d 480, 39 LRRM 2253 (9th Cir. 1956). As to the possible effect of the existence of multiple bargaining units among the Company's employees, compare Anheuser-Busch, Inc., 112 NLRB 686, 36 LRRM 1086 (1955) and Speidel Corp., 120 NLRB 733, 42 LRRM 1039 (1958) with Crosby Chemicals, Inc., 121 NLRB 412, 42 LRRM 1371 (1958).

to none of its employees except on the two occasions when a group of workers had participated in a prolonged strike. We think this fact is hardly sufficient however, from which to draw the inference that the idea of all or nothing constituted the Company's general practice. Surely the Board could not infer from the firing of union sympathizers over the years that an employer followed a general practice of getting rid of unionists if the employer could show that the work of every man discharged was exceedingly bad. Some further evidence would be necessary, and we think it is also necessary in the instant case. Here the Company can and has explained each of its bonus decisions since 1946 on the basis of the Five Factor Formula.<sup>13</sup> The Board cannot simply assume that because the Christmas gifts can also be explained by attributing another system to the Company, a system which includes unlawful exceptions, such an unlawful system was utilized. We hold that the Board could not

<sup>13</sup> The Company's witness, Thomas G. Morris, testified that the bonuses to the Pittsburgh production and maintenance workers in 1951 and to their Santa Clara counterparts in 1957 were denied because of low group productivity as shown by the imbalance in the pertinent administration account for the year in question. See note 2 Supra. The failure to give a bonus to anybody in 1956 is attributed to factors 1 and 2; the Company's overall earnings were insufficient. In 1950 and 1953 the administration loss at the Pittsburgh plant was higher than it was in 1951 when the bonus was withheld. Morris testified that the 1953 bonus was given at Pittsburgh because the Company anticipated that the administration results there would greatly improve in the next year; in other words, the outlook under factor 5 was good. At Santa Clara in 1957, the factor 5 outlook was dim. As far as the 1950 bonus at Pittsburgh is concerned, Morris testified that the gift was given despite low productivity because the Company had experienced a year of unusual profit from all of its facilities. Yet the General Counsel's evidence tended to show that 1957 was also a year of great profit for Pittsburgh-Des Moines. Indeed, the failure of the Company to explain why 1950 at Pittsburgh was different from 1957 at Santa Clara—perhaps factor 5 again—is in our view the single, specific aspect of the case which could indicate an unlawful motive. On the basis of the record as a whole, however, this indication is overwhelmed by credible evidence that the Company did not intend to penalize strikers.

reasonably have inferred, as it did, from the history of the Company's giving at Christmas time, that petitioner had followed a general practice of rewarding all of its employees or none of them. In the absence of other, indicative evidence, the inference is wholly unjustified. See *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.*, 217 F.2d 366, 368, 34 LRRM 2412 (9th Cir. 1954).

The Board purportedly found additional evidence of the Company's general practice in the testimony of witnesses for the union who said that Mr. Fegtly, the man in charge of Pittsburgh-Des Moines' West Coast operations, had told them, while explaining why the Santa Clara workers did not receive a Christmas bonus in 1956, that the Company's practice was to give to all or to none and that although the Santa Clara employees did exceptionally good work in 1956, since the overall earnings at other plants were not sufficient to warrant a bonus, nobody was going to get one. At the hearing before the Trial Examiner Fegtly denied making any such statement concerning the Company's general practice in awarding Christmas bonuses, and stated that the Company always used the Five Factor Formula. The Trial Examiner credited Fegtly in full and disbelieved the witnesses for the union, who testified to the words which Fegtly denied. The Board, although it did not hear the witnesses and could not have observed their demeanor nor judged their veracity at first hand, reversed the Trial Examiner on his findings of credibility.

We have recently had occasion to re-assert that credibility is peculiarly the province of the Trial Examiner and that a reviewing court should not disturb his findings on that score unless the testimony which he credited was hopelessly or inherently incredible. *N.L.R.B. v. Local 10, Int'l Longshoremen's Union*, 9th Cir., 10/13/60, 46 LRRM 3141. The Board, possessing an expertise which a reviewing court does not have, is not similarly restricted. Nonetheless, "we

are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded." *N.L.R.B. v. Universal Camera Corp.*, 190 F.2d 429, 430, 28 LRRM 2274 (2d Cir. 1951). Nor should the Board be permitted are not to be reluctant to insist that an examiner's findings of credibility made by the Trial Examiner or to discard positive findings of credence in favor of inferences drawn from tenuous circumstances. *N.L.R.B. v. Pyne Molding Corp.*, 226 F.2d 848, 849, 37 LRRM 2007 (2d Cir. 1955); *Boeing Airplane Co. v. N.L.R.B.*, 217 F.2d 369, 376, 34 LRRM 2821 (9th Cir. 1954). We think this is exactly what the Board has done in the present case by refusing to accept the Trial Examiners' belief in Fegly's testimony yet believing the testimony of others whom the Trial Examiner refused to credit. The reversal of the Trial Examiner's findings was based on the tenuous inference drawn from the history of petitioner's Christmas gifts and from the sketchy evidence discussed below. Viewing the evidence "in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view," we are convinced that the finding of the Board that the Company's general practice in giving Christmas bonuses was to reward all of its employees or none of them is unsupported by substantial evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 27 LRRM 2373 (1951); *Morrison-Knudsen Co. v. N.L.R.B.*, 276 F.2d 63, 73, 45 LRRM 2907 (9th Cir. 1960).

The other evidence relied on by the Board in reaching its conclusion that the denial of the 1957 Christmas bonus to the production and maintenance workers at Santa Clara was motivated by a desire to penalize them for engaging in a prolonged strike is equally flimsy. First, the Board noted that the resolution of the Company's Board of Directors which withheld the bonus did so in regard to the

"striking employees" at the Santa Clara plant. That the resolution was put in these terms does not in our opinion afford a proper basis for inferring that the purpose of the denial was to penalize the strikers. Again, we think the inference drawn by the Board is completely arbitrary; motivation is not to be inferred from terms of designation. Freudian theory is not yet an adequate substitute for the required evidence of intent. The Board also relied upon a statement made by Robert Barrett, the Company's personnel manager at Santa Clara, to the effect that the striking employees had pretty well fixed the situation and that he, Barrett, could not see why the Company would give money away to men who had caused it to suffer a substantial loss. The record shows that Barrett had come to work with petitioner only months before he made the statement outlined above, that he did not know how the determination to give Christmas bonuses was made, that nobody in the Company had ever told him that the denial of the 1957 bonus to the Santa Clara strikers was to penalize them for striking, and that whatever he said was only his own personal opinion. To infer the motive of the Company from Barrett's statement is to indulge in out-and-out conjecture. Barrett's admission that he had no idea of how the Company made its bonus decisions totally divorces his opinion of the reasons underlying the withholding of the 1957 bonus from the actual reasons upon which the Company acted. Consequently, no inference of motive can be drawn from what Barrett said.

Lastly, the Board relied upon a statement made by Feghtly: "The lengthy strike at Santa Clara in 1957 obviously affected the earnings of the Santa Clara plant for that year. It was determined that the hourly employees at the other plants should not be penalized." From this the Board inferred once again that the Santa Clara production and maintenance employees were being punished



for striking. The inference here is not quite so far-fetched as the inferences drawn by the Board from the evidence previously discussed. However, a statement *in vacuo* is one thing; looked at in context, it is another. Fegtly's testimony was to a large extent an elucidation of the Company's present position, that the denial of the bonus to the Santa Clara strikers in 1957 was due to the application of the Five Factor Formula, especially factor 4, which measured group productivity. The strike of necessity lowered this productivity at Santa Clara while the productivity at the other plants remained high since no other prolonged strike occurred during the year. The Board, however, seized upon Fegtly's use of the word "penalized" to ascribe to his statement a meaning which is refuted by page after page of his testimony at the hearing. On the record as a whole, the inference drawn by the Board is unjustified.

In sum, on the basis of a number of unwarranted inferences the Board overturned the credibility findings of the Trial Examiner and concluded that petitioner's motive in denying a bonus to the production and maintenance workers at Santa Clara was to penalize them for engaging in a prolonged strike. The record in its entirety is too weak to sustain such a position. We held that the evidence to support the decision of the Board that the Company was motivated by a desire to punish strikers and thus to interfere with and discourage protected activity is fatally insubstantial; that the record before us "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490, 27 LRRM 2373 (1951). In the absence of sufficient evidence to show that the true intent of the employer was to interfere with or discourage protected activity, the



Board's order cannot stand. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46, 1 *ERRM* 703 (1937); *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132, 1 *LRRM* 732 (1937); *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 42-44, 33 *LRRM* 2417 (1954).

This is not an easy case. We are fully aware that the vicillations of group productivity are predictably so closely related to participation by the group in protected activity that an extension of the Radio Officers' rule may well be thought appropriate from a policy viewpoint. Indeed, the fifth factor in the Company's formula is so broad and flexible that it fairly cries out for abuse, abuse which could conceivably insure that only the low group productivity caused by engagement in prolonged strikes would result in the denial of bonuses. Nonetheless, we do not think the record in the instant case justifies such a step. The evidence showed that petitioner had initiated the administration account procedure in 1936, only one year after the passing of the Wagner Act and before the first Labor Act cases were decided by the Supreme Court. This fact, in our view, minimizes the possibility that the formula was devised as a coverup for unlawful discrimination. Moreover, the evidence before the Board clearly failed to establish that the formula was in fact so utilized or that the formula was not used at all. An employer is not guilty of unfair labor practices simply because his activity can all too easily be perverted into a system of unlawful discrimination. The unlawful act itself, not proximity to it, must be shown.

The petition to set aside the order of the Board here reviewed is granted. The order is set aside.

# SUPREME COURT OF THE UNITED STATES

Nos. 64 AND 85.—OCTOBER TERM, 1960.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner,

64

v.

National Labor Relations Board.

National Labor Relations Board, Petitioner,

85

v.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 17, 1961.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner union (along with the International Brotherhood of Teamsters and a number of other affiliated local unions) executed a three-year collective bargaining agreement with California Trucking Associations which represented a group of motor truck operators in California. The provisions of the contract relating to hiring of casual or temporary employees were as follows:

"Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any

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employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, *irrespective of whether such employee is or is not a member of the Union.*

"Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source." (Emphasis added.)

Accordingly the union maintained a hiring hall for casual employees. One Slater was a member of the union and had customarily used the hiring hall. But in August 1955 he obtained casual employment with an employer who was party to the hiring-hall agreement without being dispatched by the union. He worked until sometime in November of that year, when he was discharged by the employer on complaint of the union that he had not been referred through the hiring-hall arrangement.

Slater made charges against the union and the employer. Though, as plain from the terms of the contract, there was an express provision that employees would not be discriminated against because they were or were not union members, the Board found that the hiring-hall provision was unlawful *per se* and that the discharge of Slater on the union's request constituted a violation by the em-

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ployer of § 8 (a) (1) and § 8 (a) (3) and a violation by the union of § 8 (b) (2) and § 8 (b) (1) (A) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 140-141, as amended, 29 U. S. C. § 158. The Board ordered, *inter alia*, that the company and the union cease giving any effect to the hiring-hall agreement; that they jointly and severally reimburse Slater for any loss sustained by him as a result of his discharge; and that they jointly and severally reimburse all casual employees for fees and dues paid by them to the union beginning six

Section 8 provides in relevant part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

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months prior to the date of the filing of the charge. 121 N. L. R. B. 1629.

The union petitioned the Court of Appeals for review of the Board's action, and the Board made a cross-application for enforcement. That court set aside the portion of the order requiring a general reimbursement of dues and fees. By a divided vote it upheld the Board in ruling that the hiring-hall agreement was illegal *per se*. 275 F. 2d 646. Those rulings are here on certiorari. 363-U.S. 837, one on the petition of the union, the other on petition of the Board.

Our decision in *Carpenters Local 60 v. Labor Board*, decided this day, *ante*, p. —, is dispositive of the petition of the Board that asks us to direct enforcement of the order of reimbursement. The judgment of the Court of Appeals on that phase of the matter is affirmed.

The other aspect of the case goes back to the Board's ruling in *Mountain Pacific Chapter*, 119 N. L. R. B. 883. That decision, rendered in 1958, departed from earlier rulings,<sup>2</sup> and held, Abe Murdock dissenting, that the hiring-hall agreement, despite the inclusion of a nondiscrimination clause, was illegal, *per se*.

"Here the very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over the employment status. Here all that appears is unilateral union determination and subservient employer action with no aboveboard explanation as to the reason for it, and it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty in some other respect. The Employers here have surrendered all hiring authority to the Union

<sup>2</sup> See *Hunkin-Conkey Constr. Co.*, 95 N. L. R. B. 433, 435.



and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. From the final authority over hiring vested in the Respondent Union by the three AGC chapters, the inference of the encouragement of union membership is inescapable." *Id.*, 896.

The Board went on to say that a hiring-hall arrangement to be lawful must contain protective provisions. Its views were stated as follows:

"We believe, however, that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be non-discriminatory on its face, only if the agreement explicitly provided that:

"(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

"(2) The employer retains the right to reject any job applicant referred by the union.

"(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement." *Id.*, 897.

The Board recognizes that the hiring hall came into being "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." *Id.*,



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896. n. 8: The hiring hall at times has been a useful adjunct to the closed shop.<sup>3</sup> But Congress may have thought that it need not serve that cause, that in fact it has served well both labor and management—particularly in the maritime field and in the building and construction industry.<sup>4</sup> In the latter the contractor who frequently is a stranger to the area where the work is done requires a “central source” for his employment needs;<sup>5</sup> and a man looking for a job finds in the hiring hall “at least” a minimum guarantee of continued employment.”<sup>6</sup>

Congress has not outlawed the hiring hall, though it has outlawed the closed shop except within the limits prescribed in the *provisos* to § 8 (a) (3).<sup>7</sup> Senator Taft made

<sup>3</sup> Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 Lab. L. Jour. 505, 506 (1958).

<sup>4</sup> Cf. *id.*, at 507. For expression of such view see S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 4-8; Goldberg, *The Maritime Story* (1958), pp. 277-282.

<sup>5</sup> Fenton, *op. cit.*, *supra*, note 3, at 507.

<sup>6</sup> *Id.*, at 507.

<sup>7</sup> Those *provisos* read:

“*Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in § 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made; and (ii) unless following an election held as provided in section 9 (c) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not

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clear his views that hiring halls are useful, that they are not illegal *per se*, that unions should be able to operate them so long as they are not used to create a closed shop:

"In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal: The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall. He should not be able to bind himself, however, to reject nonunion men if they apply to him; nor should he be able to contract to accept men on a rotary-hiring basis. . . .

"The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. The Board and the court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union." S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 13, 14.

available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

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There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that encourages or discourages union membership. As respects § 8 (a) (3) we said in *Radio Officers v. Labor Board*, 347 U. S. 17, 42-43:

"The language of § 8 (a) (3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

It is the "true purpose" or "real motive" in hiring or firing that constitutes the test. *Id.*, 43. Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. *Id.*, 45. And see *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793. The existence of discrimination may at times be inferred by the Board, for "it is permissible to draw on experience in factual inquiries." *Radio Officers v. Labor Board*, *supra*, 49.

But surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against "casual employees" because of the presence or absence of union membership. The only complaint in the case was by Slater, a union member, who sought to circumvent the hiring-hall agreement. When an employer and the union

\* See §§ 7 and 8, *supra*, note 1.

enforce the agreement against union members, we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed.

It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But as we said in *Radio Officers v. Labor Board*, *supra*, the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination." P. 43.

Nothing is inferable from the present hiring-hall provision except that employer and union alike sought to route "casual employees" through the union hiring hall and required a union member who circumvented it to adhere to it.

It may be that hiring halls need more regulation than the Act presently affords. As we have seen, the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. *Labor Board v. Drivers Local Union*, 362 U. S. 274, 284-290. Where, as here, Con-

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gress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.

The present agreement for a union hiring hall has a protective clause in it, as we have said; and there is no evidence that it was in fact used unlawfully. We cannot assume that a union conducts its operations in violation of law or that the parties to this contract did not intend to adhere to its express language. Yet we would have to make those assumptions to agree with the Board that it is reasonable to infer the union will act discriminatorily.

Moreover, the hiring hall, under the law as it stands, is a matter of negotiation between the parties. The Board has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements. Cf. *Labor Board v. American Inc. Co.*, 343 U. S. 395, 404. Its power, so far as here relevant, is restricted to the elimination of discrimination. Since the present agreement contains such a prohibition, the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it.

*Reversed.*

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES

Nos. 64 AND 85.—OCTOBER TERM, 1960.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Petitioner.

64 v.  
National Labor Relations Board.  
National Labor Relations Board. Petitioner.

85 v.  
Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 17, 1961.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

I join the Court's opinion upon considerations which, though doubtless implicit in what my Brother DOUGLAS has written, in my view deserve explicit articulation.

The Board's condemnation of these union "hiring hall" procedures as violative of §§ 8 (a) 1, 8 (a) 3, 8 (b) 1, and 8 (b) 2 of the Taft-Hartley Act<sup>1</sup> ultimately rests on a now well-established line of circuit court cases to the effect that a clause in a collective bargaining agreement may, without more, constitute forbidden discrimination. See, e. g., *Red Star Express Lines v. Labor Board*, 196 F. 2d 78. While seeming to recognize the validity of the proposition that contract terms which are equivocal on

<sup>1</sup> Set forth in note 1 of the Court's opinion, *ante*, p. —.



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their face should ordinarily await an independent evaluation of their actual meaning and effect<sup>2</sup> before being deemed to give rise to an unfair labor practice, such cases have justified short-circuiting that course upon these considerations: The mere existence of a clause that on its face appears to declare preferential rights for union members encourages union membership among employees or job applicants, persons not privy to the undisclosed intent of the parties, yet affected by the apparent meaning of the contract. Hence the mere possibility that such a clause may actually turn out not to have been administered by the parties so as to favor union members is not enough to save it from condemnation as an unlawful discrimination.

I think this rationale may have validity under certain circumstances, but that it does not carry the day for the Board in these cases. The Board recognizes, as it must, that something more than simply actual encouragement or discouragement of union members must be shown to make out an unfair labor practice, whether the action involved be that of agreeing to a contract term or discharging an employee or anything else. In this regard, it contends that the action of agreeing to the union "hiring" clause should be treated like any other employer or union action and that, on this premise, all that the Board must show in the light of *Radio Officers' Union v. Labor Board*, 347 U. S. 17, is that the tendency to encourage or discourage union membership was *foreseeable* to the employer or union. Since one is presumed to intend the foreseeable consequences of his acts, and since acting in order to encourage or discourage union membership is forbidden, the Board's case is said to be made by a simple showing

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<sup>2</sup> As determined, for example, from the parties' actions under them, through grievance procedures, or by arbitration, if so provided in the collective bargaining agreement.

that such encouragement or discouragement is the foreseeable result of employer or union action. The Board then concludes with a showing that encouragement of union membership is a foreseeable consequence of the acts of agreeing to or operating a union-run hiring hall.

Though, as will appear (*infra*; p. —), I believe the Board erroneously construed this Court's decision in *Radio Officers*, I do not think we can reverse its finding of "encouragement." While I agree with the opinion of the Court that the Board could not infer from the mere existence of the "hiring hall" clause an intent on the part of employer or union to discriminate in favor of union status, I think it was within the realm of Board expertness to say that the natural and foreseeable effect of this clause is to make employees and job applicants think that union status will be favored. For it is surely scarcely less than a fact of life that a certain number of job applicants will believe that joining the union would increase their chances of hire when the union is exercising the hiring function.

What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. For example, an employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. See *Labor Board v. Universal Camera Corp.*, 190 F. 2d 429. Yet a court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity. Again, an employer can properly make the existence or amount of

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a year-end bonus depend upon the productivity of a unit of the plant, although this will foreseeably tend to discourage the protected activity of striking. *Pittsburgh, Des Moines Steel Co. v. Labor Board*, 284 F. 2d 74. A union, too, is privileged to make decisions which are reasonably calculated to further the welfare of all the employees it represents, nonunion as well as union, even though a foreseeable result of the decision may be to encourage union membership.

This Court's interpretation of the relevant statutory provisions has recognized that Congress did not mean to limit the range of either employer or union decision to those possible actions which had no foreseeable tendency to encourage or discourage union membership or concerted activities. In general, this Court has assumed that a finding of a violation of §§ 8 (a) 3 or 8 (b) 2 requires an affirmative showing of a motivation of encouraging or discouraging union status or activity. See, e. g., *Labor Board v. Jones & Laughlin Co.*, 301 U. S. 1, 45-46; *Universal Camera Corp. v. Labor Board*, 340 U. S. 474. There have, to be sure, been exceptions to this requirement, but they have been narrow ones, usually analogous to the exceptions made to the requirements for a showing of discrimination in other contexts. For example, in *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793, the Court affirmed a Board decision that a company "no solicitation" rule was over-broadly applied to prevent solicitation of union membership on company property during periods when employees were otherwise free to do as they pleased. A finding of a motivation to discourage union membership was there held unnecessary because there was no employer showing of a nondiscriminatory purpose for applying the rule to union solicitation during the employees' free time. A similar absence of a significant business justification for the employer's acts which tended to discourage union activity explains the dis-

pensability of proof of discriminatory motivation in *Allis-Chalmers Mfg. Co. v. Labor Board*, 162 F. 2d 435, *Cusano v. Labor Board*, 190 F. 2d 898, and *Labor Board v. Industrial Cotton Mills*, 208 F. 2d 87.

Another field of exceptions to the requirement of a showing of a purpose to encourage or discourage union activity is found in the Court's affirmance of the Second Circuit in *Gaynor News Co., Inc., v. Labor Board*, 341 U. S. 17, a companion case to *Radio Officers*: If a union or employer is to be permitted to take action which substantially—though unintentionally—encourages or discourages union activity, the union or employer ends served by the action must not only be of some significance, but they must also be legitimate, or at least not otherwise forbidden by the National Labor Relations Act. In *Gaynor* an employer who, pursuant to a nondiscriminatory business end of paying the least wages possible, agreed with the union which was statutory representative of the employees to give certain benefits only to union members, was prevented from asserting the justifying business reasons for thus encouraging union membership because of his complicity in the union's breach of its duties as agent for *all* the employees. Indeed, the fact that a nondiscriminatory business purpose forbidden by the Act cannot be used by an employer to justify an action which incidentally encourages union membership, seems to me to be the true basis of the Court's holding in *Radio Officers* that an employer violates § 8 (a) 3 when a union forces him to take actions in order to encourage union membership. The employer's nondiscriminatory reason for encouraging union membership—to avoid the economic pressure the union could impose upon him—was surely no longer intended to be a justification for such employer action after the passage of § 8 (b) 2, a statutory provision the very wording of which presupposed that union coercion can cause a violation of § 8 (a) 3.

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There is no reason to decide now whether there are other contexts in which a showing of an actual motivation of encouraging or discouraging union activity might be unnecessary to a finding of a union or employer unfair labor practice. For present purposes, it is sufficient to note that what is involved in the general requirement of finding of forbidden motivation, as well as in the limited scope of the heretofore recognized exceptions to this general requirement, is a realization that the Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit all the represented employees. It is against this policy that we should measure the Board's action in finding forbidden the incorporation in collective bargaining contracts of the "hiring hall" clause. We must determine whether the Board's action is consistent with the balance struck by the Wagner and Taft-Hartley Acts between protection of employee freedom with respect to union activity and the privilege of employer and union to make such nondiscriminatory decisions as seem to them to satisfy best the needs of the business and the employees.

The legislative background to § 8 (a) 3 of the Act is quite clear in its indications of where this balance was to be struck. The Senate Report on this section of the original Wagner Act states:

"The fourth unfair labor practice [then, § 8 (3)] is a corollary of the first unfair labor practice. An employer, of course, need not hire an incompetent man and is free to discharge an employee who lacks skill or ability. But if the right to join or not to join a labor organization is to have any real meaning for an employee, the employer ought not to be free to discharge an employee *merely* because he joins



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an organization or to refuse to hire him *merely* because of his membership in an organization. Nor should an employer be free to pay a man a higher or lower wage *solely* because of his membership or nonmembership in a labor organization. The language of the bill creates safeguards against these possible dangers." S. Rep. No. 1184 on S. 2926, 73d Cong., 2d Sess. 6. (Emphasis added.)

And similarly:

"Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work." S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. 11.

To the same effect was the view of Senator Walsh:

"... The employer has the economic power; he can discharge any employee or any group of employees when their *only* offense may be to seek to form a legitimate organization among the workers for the purpose of collective bargaining. This bill declares that is wrong. It declares that the employee has the right to engage in collective bargaining, and it says, 'Mr. Employer, you must keep your hands off; you shall not use that effective power of dismissal from employment which you have and destroy the organization of the employees by the dismissal of one or more of your employees *when they are objectionable on no other ground than that*



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*they belong to or have organized a labor union."*

Statement of Senator Walsh, 79 Cong. Rec. 7658.

(Emphasis added.)

And further, the House Report on the bill stated:

"Nothing in this subsection prohibits interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination." H. R. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. 19.

Considered in this light, I do not think we can sustain the Board's holding that the "hiring hall" clause is forbidden by the Taft-Hartley Act. The Board has not found that this clause was without substantial justification in terms of legitimate employer or union purposes. Cf. *Republic Aviation v. Labor Board*, *supra*; *Gaynor News Co. Inc. v. Labor Board*, *supra*. Whether or not such a finding would have been supported by the record is not for us now to decide. The Board has not, in my view, made the type of showing of an actual motive of encouraging union membership that is required by *Universal Camera v. Labor Board*, *supra*. All it has shown is that the clause will tend to encourage union membership, and that without substantial difficulty the parties to the agreement could have taken additional steps to isolate the valid employer or union purposes from the discriminatory effects of the clause.<sup>3</sup> I do not think

<sup>3</sup> In connection with such clauses, the Board would have "the parties to the agreement post in places where notices to employees

that these two elements alone can justify a Board holding of an unfair labor practice unless we are to approve a broad expansion of the power of the Board to supervise nondiscriminatory decisions made by employer or union. Whether or not such an expansion would be desirable, it does not seem to me consistent with the balance the labor acts have struck between freedom of choice of management and union ends by the parties to a collective bargaining agreement and the freedom of employees from restraint or coercion in their exercise of rights granted by § 7 of the Act.<sup>4</sup>

I therefore agree with the Court that the Board's holding that the clause in question is invalid cannot be sustained.

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and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement." These safeguards, which are also to be made contract terms, provide that:

"(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect of obligation of union membership, policies, or requirements.

"(2) The Employer retains the right to reject any job applicant referred by the union."

<sup>4</sup> Set forth in note 1 of the Court's opinion, *ante*, p. —.

# SUPREME COURT OF THE UNITED STATES

Nos. 64 AND 85.—OCTOBER TERM, 1960.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner.

64

v.

National Labor Relations Board.

National Labor Relations Board,  
Petitioner.

85

v.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[Decided 17, 1961.]

MR. JUSTICE CLARK, dissenting in part.<sup>1</sup>

I cannot agree with the casual treatment the Court gives to the "casual employee" who is either unable to get employment or is fired therefrom because he has not been cleared by a union hiring hall. Inasmuch as the record, and the image of a hiring hall which it presents, is neglected by the Court, a short resume of the facts is appropriate.

Lester Slater, the complainant, became a "casual employee" in the truck freight business in 1953 or early 1954. He approached an employer but was referred to the union hiring hall. There the dispatcher told him to

<sup>1</sup> I agree with the Court's disposition of that part of the Board's petition seeking direct enforcement of the order of reimbursement.

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see Barney Volkoff, an official of the union, whose office in the union headquarters building was some three miles away. Describing his visit to Volkoff, Slater stated that "[I] just give him [Volkoff] the money to send back East to pay up my dues back there for the withdrawal card. . . . and I went right to the [hiring] hall and went to work." However, this was but the beginning of Slater's trouble with the hall. After some difficulty with one of his temporary employers (Pacific Intermountain Express), the hall refused to refer Slater to other employers. In order to keep employed despite the union hall's failure to dispatch him, Slater relied on a letter from John Annand, an International Representative of the union, stating that "you may seek work wherever you can find it in the freight industry without working through the hiring hall." It was this letter that obtained Slater his employment with Los Angeles-Seattle Motor Express, where he was characterized by its dock foreman as being "a good worker." After a few months employment, the Business Agent of the union (Victor Karaty) called on the Los Angeles-Seattle Motor Express, advising that it could not hire Slater "any longer here without a referral card"; that the company would "have to get rid of Slater, and if [it] . . . didn't, that he was going to tie the place up in a knot, [that he] would pull the men off." Los Angeles-Seattle Motor Express fired Slater, telling him that "[We] . . . can't use you now until you get this straightened out with the union. Then come back; we will put you to work." He then went to the union, and was again referred to Volkoff who advised, "I can't do anything for you because you are out. You are not qualified for this job." Upon being shown the Annand letter, Volkoff declared "I am the union." On later occasions when Slater attempted to get clearance from Volkoff he was asked "How come you weren't out on that—didn't go out on the picket line?" (Apparently

the union had been on a strike.) Slater replied, "I told him that nobody asked me to. I was out a week. I thought the strike was on. The hall was closed. The guys told me there weren't no work." The landlady of Slater also approached Volkoff in an effort to get him cleared and she testified that "I asked Mr. Barney Volkoff what he had against Lester Slater and why he was doing this to him." And she quoted him as saying: "For a few reasons, one is about the P. I. E. [Pacific Intermountain Express] . . . [a]nother thing, he is an illiterate." She further testified that "he [Volkoff] didn't like the way he dressed. And he [Volkoff] fussed and fussed around." He therefore refused to "route," as the Court calls it, Slater through the union hiring hall.

The Court finds that the National Labor Relations Act does not ban hiring halls *per se* and that therefore they are illegal only if they discriminate on the basis of union membership. It holds that no such actual discrimination was shown and that none is inferable from the face of the contract since it has a protective clause. Collaterally it holds, quoting Senator Taft, that hiring halls are "useful"; that they save time and eliminate waste and, finally, that the Court "cannot assume that a union conducts its operations in violation of law."

I do not doubt for a moment that men hired through such arrangements are saved the expense and delay of making the rounds of prospective employers on their own. Nor do I doubt their utility to employers with varying employee demands. And I accept the fact that Congress has outlawed only closed shops and allowed hiring halls

<sup>2</sup> Interestingly enough, the Board in its Twenty-Third Annual Report (1958), characterized its holding in *Mountain Pacific Chapter*, 119 N. L. R. B. 883, in the following language: "It may reasonably be inferred, the Board held, that a union to which an employer has so delegated hiring powers will exercise its power with a view to securing compliance with membership obligations and union rules." At p. 68.

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to remain in operation. But just as those observations are not, in the final analysis, relied upon by the Court today in reaching its decision, my acquiescence in them is only a prologue to my dissent from the remaining considerations upon which its decision actually rests. These considerations are dependent upon the construction given § 8 (a)(3) and I therefore first turn to that section.

Section 8 (a)(3) provides, in part, that it shall be an unfair labor practice for an employer

*"by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."* (Emphasis added.)

As I view this prohibition, which by § 8 (b)(2) is also applied to unions when causing or attempting to cause any employer to violate this section, two factors must be present before there is an unfair labor practice: (1) discrimination in the hiring or tenure of employees which is intended to, or inherently tends to, result in (2) encouragement or discouragement of membership in a union.

The word "discrimination" in the section, as the Board points out and I agree, includes not only distinctions contingent upon "the presence or absence of union membership," *ante*, p. —, but all differences in treatment regardless of their basis. This is the "cause" portion of the section. But § 8 (a)(3) also includes an "effect" clause which provides that the intended or inherent effect of the discrimination must be "to encourage or discourage [union] membership." The section has therefore, a divided structure. Not all discriminations violate the section, but only those the effect of which is encouragement or discouragement of union membership. Cf. *Radio Officers v. Labor Board*, 347 U. S. 17, at 43: "Nor does this section outlaw discrimination in employment as such;



only such discrimination as encourages or discourages membership in a labor organization is proscribed." Each being a requirement of the section, both must be present before an unfair labor practice exists. On the other hand, the union here contends, and the Court agrees, that there can be no "discrimination" within the section *unless it is based on* union membership, *i.e.*, members treated one way, nonmembers another, with further distinctions, among members, based on good standing. Through this too superficial interpretation, the Court abuses the language of the Congress and unduly restricts the scope of the proscription so that it forbids only the most obvious "hard-sell" techniques of influencing employee exercise of § 7 rights.

Even if we could draw no support from prior cases, the plain and accepted meaning of the word "discrimination" supports my interpretation. In common parlance, the word means to distinguish or differentiate. Without good reason, we should not limit the word to mean to distinguish in a particular manner (*i. e.*, on the basis of union membership or activity) so that a finding that the hall dispatched employees without regard to union membership or activity bars a finding of violation. The mere fact that the section *might* be read in the manner suggested by the union does not license such a distortion of the clear intent of the Congress, *i. e.*, to prohibit all auxiliaries to the closed shop, and all pressures on employee free choice, however subtly they are established or applied. Moreover, our interpretation in *Radio Officers v. Labor Board*, *supra*, supports this position. There we said:

"The unfair labor practice is for an employer [1] to encourage or discourage membership [2] by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership

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in labor organizations; only such as is accomplished by discrimination is prohibited. *Nor does this section outlaw discrimination in employment as such; only [1] such discrimination [2] as encourages or discourages membership in a labor organization is proscribed.*" At pp. 42-43. (Emphasis added.)

The Court's conclusion is in patent conflict with that reasoning.

Given that interpretation of the word "discrimination," it becomes necessary to determine the class of employee involved, and then whether *any* differences in treatment within that class are present. The Board found the class affected by the union hiring hall to be that group which was qualified, in the sense of ability, to do the work required by the employer and who had applied for work through the hiring hall. Obviously, not all of those who apply receive like treatment. Not all applicants receive referral cards. Clearly, then, the class applying to the hiring hall is itself divided into two groups treated differently—those cleared by the union and those who were not. The next question is whether the contract requiring and endorsing that discrimination or differentiation is designed to, or inherently tends to, encourage union membership. If it does, then § 8(a)(3) has been violated.

I begin with the premise that the Congress has outlawed the closed shop and that, as the Court pointed out, "[t]he policy of the Act is to insulate employees' jobs from their organizational rights." *Radio Officers, supra*, at 40. To test the contract here, I look to probable and anticipated "employee response" to it, *id.*, at 46, recognizing that "[e]ncouragement and discouragement are 'subtle things' requiring 'a high degree of introspective perception.'" *Id.*, at p. 51. Just as in cases of his interference with-protected activities, the escape value of the

employer's "true purpose" and "real motive" is to be tested by the "natural consequences" and "foreseeable result" of his resort, however justifiably taken, to an institution so closely allied to the closed shop. I believe, as this Court has recognized, that "the desire of employees to unionize is directly proportional to the advantages *thought to be obtained* . . . ." *Radio Officers, supra*, at 46. (Emphasis added.) I therefore ask, "Does the ordinary applicant for casual employment, who walks into the union hall at the direction of his prospective employer, consider his chances of getting dispatched for work diminished because of his non-union status or his default in dues payment?" Lester Slater testified—and it is uncontradicted—that "He [the applicant] had to be a union member; otherwise he wouldn't be working there; . . . you got to have your dues paid up to date and so forth." When asked how he knew this, Slater replied, "I have always knew that." Such was the sum of his impressions gained from contact with the hall from 1953 or 1954 when he started to 1958 when he ended. The misunderstanding—if it is that—of this common worker, who had the courage to complain, is, I am sure, representative of many more who were afraid to protest or, worse, were unaware of their right to do so.

Of the gravity of such a situation the Board is the best arbiter and best equipped to find a solution. If is, after all, "permissible [for the Board] to draw on experience in factual inquiries." *Radio Officers, supra*, at 49. It has resolved the issue clearly, not only here, but in its 1958 Report which, as I have said, repeated its *Mountain Pacific* position "that a union to which an employer has so delegated hiring powers will exercise its powers with a view to securing compliance with membership obligations and union rules." At p. 68. In view of

Slater's experience, for one, the idea is certainly not far-fetched. Despite the contract provision as to equal treatment between union and nonunion men after a minimum amount of seniority is obtained, we find here that Slater had to "pay up" his dues in 1953. Despite the seniority rule,<sup>3</sup> dispatch was often made, the record shows, due to favoritism by the employer. Despite the contract's solemn words, the uncontradicted evidence is that lack of intellect, taste in dress and failure to appear on a union picket line prevented an employee from getting a job, although he was a "good worker." Likewise, approaching a union official (who indignantly asserts "I am the union") with a letter from a union "higher-up" may result in loss of work. Such factors are infinitely more persuasive than the self-serving declaration of a union hiring-hall agreement.<sup>4</sup>

However, I need not go so far as to presume that the union has set itself upon an illegal course, conditioning referral on the unlawful criterion of union membership in good standing (which inference the majority today says cannot be drawn), to reach the same result. I need only assume that, by thousands of common workers like Slater, the contract and its conditioning of casual employment upon union referral will work a misunderstanding as to the significance of union affiliation unless the employer's abdication of his role be made less than total and some note of the true function of the hiring hall be posted where all may see and read. The tide of encouragement may not be turned, but it will in part at least be stemmed. As an added dividend, the inherent probability of the free-wheeling operation of the union hiring

<sup>3</sup> The employers did not receive any seniority lists from the union and were unaware of whether this provision of the agreement was being properly administered.

hall resulting in arbitrary dispatching of job seekers would to some significant extent be diminished.

I would hold that there is not only a reasonable likelihood, but that it must inescapably be concluded under this record, that, without the safeguards at issue, a contract conditioning employment *solely upon union referral*, encourages membership in the union by that very distinction itself. As the Board expressed it in *Mountain Pacific Chapter, supra*, at 895:

"[T]he very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over the employment status."

A reasonable interpretation of the Act also demands that both the employer and the union be deemed violators. In determining that issue, I say that the Board is the best judge. I say that it has made an "allowable judgment." It is not for the courts to differently assess the hiring hall's "cumulative effect on employees" or job applicants. *Labor Board v. Sture Spinning Co.*, 336 U. S. 226, 231. Its findings here should, therefore, "carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 488.

Finally, let me say that the Board should not be hamstrung in its effort to enforce the mandate of the Congress that there shall be no closed shop. As Senator Taft stated on the floor of the Senate:

"Perhaps [the closed shop] is best exemplified by the so-called hiring halls on the west coast where ship-owners cannot employ anyone unless the union sends him to them . . . . Such an arrangement gives the

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union tremendous power over the employees; furthermore, it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field."

That is where Lester Slater finds himself today. I therefore dissent.

MR. JUSTICE WHITTAKER joins in all except note 1 of this dissent, but would also add the reasons, respecting the Board's powers to make the order in question, that are stated in his dissent in No. 68, *Carpenters, Local 60 v. Labor Board*, decided this day, *post*, p. 7.